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ABSTRACT

A hearing was held to examine the Consumer Product Safety Commission's (CPSC) settlement of its imminent hazard enforcement case against the major manufacturers of all-terrain vehicles (ATV), a product causing, as of January, 1988, a total of 330,000 serious injuries and over 900 deaths, nearly half of these to children. Central to the Committee's concern was the question of why the CPSC dropped a provision providing for voluntary refunds to ATV owners. Additional questions of concern included: (1) Was the settlement adequate and effective, given the nature of the risk to consumers? (2) How was the settlement arranged? (3) What role did the Justice Department play? (4) What facts changed in the course of a year to cause one Commissioner to change her mind and drop the refund remedy? (5) How will the CPSC and the Justice Department monitor the preliminary and final consent decrees? (6) Does the CPSC have the budget to keep track of an exceptionally complicated arrangement? and (7) What details are being negotiated in the development of the final consent decree? Included in or appended to the report are an article exploring the effectiveness of information and education programs in promoting behavioral change, the report and recommendations of the National Association of Attorneys General (NAAG) ATV task force, the brief of 30 amici curiae states in the case of the United States versus American Honda Motor Co. et al., and the Justice Department complaint and the preliminary consent decree pertaining to the case. (RH)

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ALL-TERRAIN VEHICLE SETTLEMENT

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HEARING

BEFORE A

SUBCOMMITTEE OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

JANUARY 28, 1988

Printed for use of the Committee on Government Operations

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ALL-TERRAIN VEHICLE SETTLEMENT

THURSDAY, JANUARY 28, 1988

House of Representatives,
Commerce, Consumer,
and Monetary Affairs Subcommittee
of the Committee on Government Operations,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2154, Rayburn House Office Building, Hon. Doug Barnard, Jr., (chairman of the subcommittee) presiding.

Present: Representatives Doug Barnard, Jr., Larry E. Craig, James M. Inhofe, and Christopher Shays.

Also present: Theodore J. Jacobs, chief counsel; Faye Ballard, clerk; Judy Fisher, secretary; and Russell J. Mathews, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN BARNARD

Mr. **Barnard.** The subcommittee will please come to order.

Today's hearing by the Commerce, Consumer, and Monetary Affairs Subcommittee will examine the recent settlement by the Consumer Product Safety Commission of its case against the major ATV manufacturers.

The subcommittee has had a longstanding interest in this matter. As far back as May 1985, we held the first congressional oversight hearing on the CPSC's handling of the then emerging safety hazard from ATV's. In December 1986—after substantial congressional and public concern—the CPSC decided that the vehicles presented an imminent hazard and that an action to seek remedies to reduce the risks should be brought. On the eve of filing suit, and after the case had been thoroughly prepared at great cost to the taxpayer, the CPSC agreed to a settlement of the case that provided only a fraction of the relief provided in the original decision. It is instructive to note that at the time of our first hearing, there were 161 ATV-associated deaths and 128,000 emergency room injuries. Now the number of deaths exceeds 900 with injuries totaling 330,000. Nearly half of those killed and injured have been children. Yet in this 3-year period, while deaths and injuries have increased dramatically, nothing effective has been done by either the Commission or the manufacturers to halt the onslaught.

The major deficiency in the settlement is simply that it gives up the only effective remedy the Commission had to reduce the number of vehicles in the hands of consumers—the provision providing for voluntary refunds for existing ATV owners. In the view of many product safety experts, the only effective way to reduce injuries and deaths is to reduce the numbers of vehicles in use. They argue that training and warnings are not adequate to do the job. Nevertheless, after waiting so long for the Justice Department to act, the Commission simply gave up the refund remedy. Why did it do so? A central purpose of this hearing is to determine this question.

But our determination of all the facts has been made more difficult by the Justice Department's refusal to testify voluntarily here today. While the Justice Department refuses to appear before this committee, Justice officials have had no hesitancy in talking to the press about this case, and in a manner which can only work to weaken the Government's position. I refer to the interview given by Deputy Assistant Attorney General Robert Cynkar in which he is quoted as saying, in reference to the refund remedy, "It was our opinion and the CPSC's that we had no chance of winning in court on that one." It is inconceivable that the Government would make such a statement while it is still negotiating with the manufacturers. Yet Mr. Cynkar does not deny having said it. I also find it reprehensible that the Justice Department should so readily talk to the press when it refuses to come before a congressional committee. If we cannot get the complete story today, it may be necessary for the subcommittee to vote to subpoena the Justice Department to appear here.

Today's hearing will seek answers to the following questions: First, is this settlement adequate and effective, given the nature of the risk? ATVs present an unprecedented risk: The U.S. Government has never before faced a product safety problem within its control that results in 20 deaths each month. Will this settlement—which emphasizes notice, warnings and training—result in a proportionate reduction in these statistics?

Second, how was the settlement arranged? What role did the Justice Department play? What facts changed in the course of a year to cause one Commissioner to change her mind and drop the refund remedy?

Third, how will the CPSC and the Justice Department monitor the preliminary and final consent decrees? Does the CPSC have the budget to keep track of an exceptionally complicated arrangement?

Fourth, finally, the subcommittee wants to get an update on the ongoing negotiations before a final decree is entered. The preliminary consent decree in many respects is a "bare bones" outline with the details to be inserted before entry of the final decree. The Justice Department has shut Congress and the public out of the settlement process, on the misguided ground that secrecy was necessary to obtain a meaningful agreement. In fact, the public has a right and a need to know how and why this agreement was reached. The hearing will serve this purpose, among others.

Mr. Craig, do you have an opening statement, sir?

Mr. Craig. I do, Mr. Chairman. Thank you very much.

Mr. Chairman, members of the committee, as many know, over the past two Congresses, the chairman and I have examined the issue of all-terrain vehicles' safety, vigorously debated it, and arrived at varying conclusions as to the best way of obtaining ATV safety. I want to say at the outset of the hearing that my sincere sympathy goes to all of those victims of unforeseen circumstances while operating ATV's. For this reason, I look for remedies that will show the most immediate and positive net effect.

It appears that a preliminary consent decree provides a window of opportunity for a cooperative effort between the Consumer Product Safety Commission, the Department of Justice, and the ATV industry. This hearing encourages the CPSC and the Department of Justice to pursue remedies in the courts that may never be obtained. With the ATV settlement, the Consumer Product Safety Commission and the Justice Department have made substantial gains without tying safety up in the courts for many years.

I am surprised that the chairman is questioning the progress of the settlement in light of the fact the preliminary consent decree offers many remedies consistent with the recommendations of the two Government Operations Committee reports that have been crafted by this very subcommittee, filed in July 1986 and October 1987, respectively.

For example, the more recent report states that the Commission deserves commendation for seeking to provide for notice, warnings and hands-on training. The earlier report urges the ATV manufacturers to stop the production of three-wheeled ATV's, contact existing owners about ATV safety concerns, stress the need for safety riding practices in their ATV advertisements and utilize warning labels.

After reviewing the two reports and the preliminary consent decree, it becomes clear that significant and costly concessions were made by the manufacturers. For the record, I wish to summarize the preliminary consent decree which requires the manufacturers to do the following: It sends out a notice to all known past purchasers of ATV's informing them of the risks associated with ATV's. It requires all distributors and retailers of ATV's to prominently display 4-by-4 warning signs. It immediately halts the sale of all three-wheeled ATV's and offers to repurchase those three-wheelers in dealers' open stock. It requires the manufacturers to affix warning labels to all ATV's marketed and sold by them. It requires the manufacturers to include the risks associated with ATV's in the owners' manuals.

The settlement establishes a toll free hot line number for consumers' questions on ATV's. It establishes a detailed administrative framework and the necessary staffing to conduct ATV training. In addition to offering free hands-on training to all future ATV purchasers, including those who purchased ATV's in the last 12 months, it commits the manufacturers to agree not to oppose, I repeat, not to oppose State legislative initiatives for licensing and certification of ATV operators.

And I would like to add, Mr. Chairman, I am absolutely amazed that States that normally license all motorized vehicles have stood absolutely by on this issue. If they had moved in the area where States can be most responsive, we wouldn't have had 13- and 14-year-olds riding these vehicles. They simply would not have been licensed to do so.

It commits the manufacturers to agree to establish specific guidelines for future advertising about the image of ATV's, including specific guidelines on the types of terrain on which ATV's should be driven, the speed at which they should be driven, the stability of

ATV's and the importance of training courses and appropriate age recommendations for various models.

Mr. Chairman, as you can see from my point of view, I too am tempted to argue that less than half a loaf has been dealt because there are several provisions of the settlement with which I am not totally comfortable with. Furthermore, many ATV operators and dealers throughout the country feel the same way as I do, and we shall hear from one of those here today.

Although the injury rate is on the decline, there are remedies in the settlement that could continue to improve this reduction of ATV operator injuries. Although I do not full heartedly agree with all of the provisions of the settlement, I am willing to accept accomplishment toward immediate settlement and safety remedies. I believe the old adage, "One in the hand is worth more than two in the bush," is extremely valuable in this situation. Obviously you disagree.

Fully empathizing, Mr. Chairman, with your differing views on this issue, I am disappointed that you are not supporting the preliminary consent decree yet, especially in light of the fact that substantial safety reference relief can be addressed and addressed now.

I will ask the witnesses today how many injuries can be avoided now by making the preliminary consent decree final. I also want to ask what are the costs associated with and the potential benefits of litigation in this case if they can be spelled out. It is my hope that this issue does not regress into what could ultimately be by this hearing today an overemphasis, a political boondoggle or crusade, in fact a parade in the name of safety when no safety will be arrived at, at a very heavy expense.

As far as I can tell, a majority of the people who own ATV's do not seek a ban or recall. For example, of the more than 4,500 consumer comments on the Consumer Product Safety Commission A&PR, only 50 consumers wanted a ban on the recall, only 50 of the 4,500. In addition a CNN evening news poll of December 31, 1987, asked viewers whether ATV's should be banned. Twenty-three percent said yes; 77 percent said no.

By seeking legal recourse under a section 12 enforcement action of the Consumer Product Safety Act, there are no guarantees for the prosecutor or for the defendant. At best, some type of injunctive relief might be obtained in the courts 3 or 4 years down the road, or at worst the ATV owner will have no safety improvements at all during that period of time.

In October of last year, I said that if the Consumer Product Safety Commission followed through with its December 12, 1986, decision to seek injunctive relief in the courts under section 12 of the Consumer Product Safety Act, it would not withstand the test of judicial review. I based this on my understanding of the issue and on the CPSC's past track record. Between 1973 and 1984, it appears that CPSC in its zeal for safety regularly overstepped its bounds. During this era, at least nine Commission mandatory standards and/or actions banning hazardous products were successfully challenged in the courts. Only two CPSC rules were left totally intact following judicial review.

For example, Mr. Chairman, in 1983 the case of Gulf South Insulation versus the U.S. Consumer Product Safety Commission, and we know the rest of the story, the Commission's 6-year study and rulemaking and all of that money that was spent banning the use of foam insulations in residences and schools was dismissed because the Commission failed to produce the substantial evidence necessary to support its rulemaking.

I believe that this is what the Justice Department is trying to tell us at this time as it seeks a solution to the problem. Despite the fact that the ban was later struck down, it nearly destroyed the urea formaldehyde industry and knocked down resale value of America's homes insulated with the product by nearly $15,000 per unit.

Well, Mr. Chairman, I could go on and on about the failed record of the Consumer Product Safety Commission, and, of course, the most recent one, the one that probably parallels this case closer than any other, was the U.S. versus General Motors in which it was necessary, and yet being necessary, the Federal Government failed to do the comparative kind of studies that were necessary to prove the GMX car was unique and in its own case dangerous.

I have an ATV, I make no bones about that, and I have said that publicly many times, and I fully agree with the chairman, that there are safety concerns to consider during the machine's operation, and I am saddened about the 900 ATV deaths that have occurred since 1982. I have always felt that way, and I have made that very clear to everyone involved. However, I am just as concerned about the estimated 1,200 boating accidents that occurred in 1986 alone and the 900 bicycle deaths that occurred in 1986 and the thousands of automobile fatalities.

The answer to the safety question does not lie in bans or recalls that cannot be enforced—I repeat that cannot be enforced—but the solution can be found in substantive education and hands-on training, elements of the proposed consent decree that are extremely valuable to the consumer. I am convinced that we cannot live in a risk-free society, Mr. Chairman, nor should this Congress try to micromanage one, although I know there are many who think different. I am of the opinion that if the Consumer Product Safety Commission, with the assistance of the Justice Department, chooses to litigate the case rather than settle it, it may be running itself into a stone wall as it has time and time again.

Moreover, in a December 30 press conference, the Justice Department made the following reference in the enforcement action mandating a recall under section 12 of the Consumer Product Safety Commission Act, and I think you quoted from a similar press conference, Mr. Chairman, I quote:

> The point is that—there was a very, very substantial issue, an issue of law as to whether or not under this statute that the court could grant that kind of relief because there is a very substantial question of whether it would indeed prevail on the issue.

I could go on and on, I won't, Mr. Chairman, it could be a long hearing, but it is my view this hearing is potentially disruptive to any further settlement process. Its direct and indirect effects could force the case to be thrown out of court if ultimately, the rights of the Consumer Product Safety Commission being preserved to proceed, they would choose to take it in that direction and hence destroy all hopes of expeditious safety improvements for ATV operators.

I want to go on record as saying most of the witnesses invited today was of your choosing and the issue they will address is of your choosing. If there is any subject that you feel is sensitive to the case and should not be disclosed to the public at this time, I would appreciate it if you would clarify that for those witnesses involved. It is important that the record remain clear and both the Consumer Product Safety Commission and the Justice Department be allowed the latitude to act under the law.

Thank you very much, Mr. Chairman.

[The opening statement of Mr. Craig follows:]

OPENING STATEMENT OF THE HONORABLE LARRY E. CRAIG ON THE ADEQUACY AND EFFECTIVENESS OF THE ALL-TERRAIN VEHICLE SETTLEMENT

JANUARY 28, 1988

Good Morning. As many know, over the past two Congresses, the Chairman and I have examined the issue of all-terrain vehicle (ATV) safety, vigorously debated it, and arrived at varying conclusions as to the best way of obtaining ATV safety. I want to say at the outset of the hearing that my sincere sympathy goes out to those who are victims of unforeseen circumstances while operating ATV's. For this reason, I look for remedies that will show the most immediate and positive net effect. It appears the preliminary consent decree provides a window of opportunity for a cooperative effort between the Consumer Product Safety Commisssion (CPSC), the Department of Justice (DOJ) and the ATV industry. This hearing encourages the CPSC and the DOJ to pursue remedies in the courts that they may never obtain. With the ATV settlement, the CPSC and the DOJ have made substantial gains without tying safety up in the courts for many years.

I am surprized that the Chairman is questioning the progress of the settlement, for the preliminary consent decree offers many remedies that are consistant with the recommendations of two Government Operations Committee Reports [House Report 99-678 and 100-335 filed July of 1986 and October of 1987 respectively]. For example, the more recent report states that "the Commission deserves commendation" for seeking to provide for notice, warnings, and 'hands-on' training." The earlier report urged ATV manufacturers to stop the production of three-wheeled ATV's, contact existing owners about ATV safety concerns, stress the need for safe riding practices in their ATV advertisments, and utilize warning labels. After reviewing the two reports and the preliminary consent decree, it becomes clear that significant and costly concessions were made by the manufacturers.

For the record, I wish to summarize the preliminary consent decree, which requires the manufactures to do the following: (1) it sends a notice to all known past purchasers of ATVs informing them of the risks associated with ATV's; (2) it requires all distributors and retailers of ATV's to prominently display 4' X 4' warning signs; (3) it immediately halts the sale of all three-wheeled ATV's and offers to repurchase those three-wheelers in dealer's open stock; (4) it requires the manufacturers to affix warnings labels to all ATV's marketed and sold by them; (5) it requires the manufacturers to include the risks associated with ATV's in the owner's manuals; (6) the settlement establishes a toll free hot-line number for consumer questions on ATVs; (7) it establishes a detailed administrative framework and the necessary staffing to conduct ATV training, in addition to offering free "hands-on"training to all future ATV purchasers, including those who purchased ATVs in the last 12 months;

(8) it commits the manufacturers to agree not to oppose state legislative initiatives for the licensing and certification of ATV operators; and (9) it commits the manufacturers to agree to establish specific guidelines for future advertising about the image of ATVs including: (a) specific guidelines on the types of terrain on which ATVs should be driven, (b) the speeds at which they should be driven, (c) the stability of ATVs, and (d) the importance of training courses and appropriate age recommendations for various ATV models.

Mr. Chairman, as you can see from my point of view, I too am tempted to argue that less than "half of the loaf" has been dealt because there are several provisions of the settlement with which I am not totally comfortable with. Furthermore, many ATV operators and dealers throughout the country feel the same way that I do. (And we shall hear from one of those people hear today.) Although the injury rate is on the decline, there are remedies in the settlement that could continue to improve this reduction of ATV operator injuries. Eventhough I do not full-heartedly agree with all of the provisions of the settlement, I am willing to compromise and give this settlement a chance.

Fully empathizing with your differing views on this issue, Mr. Chairman, I am disappointed that you are not supporting the preliminary consent decree yet, esspecially in light of the fact that substantial safety relief can be addressed now. I will ask the witnesses today, how many injuries can be avoided NOW by making the preliminary consent decree -- FINAL? I will also ask what are the costs associated with the benefits (if any) of litigating this case? It is my hope that this issue does not regress into a political boondogle, a cause that is crusaded and paraded in in the name of safety, but does it at safety's very expense. As far as I can tell a majority of the people who own ATVs do not seek a ban or a recall. For example of the more than 4500 consumer comments on the Consumer Product Safety Commission's ANPR, only 50 consumers wanted a ban or a recall of ATV's. In addition, a CNN Evening News Poll on December 31, 1987 asked viewers whether ATV's should be banned: 23 % said "YES" and 77 % said "NO".

By seeking legal recourse under a Section 12 enforcement action of the Consumer Product Safety Act there are no guarrantees for the prosecutor or the defendant: at best, some type of injunctive relief might be obtained in the courts 3 or 4 years down the road; or at worst, the ATV operator will have no safety improvements at all.

In October of last year, I said that if the Consumer Product Safety Commission followed through with its December 12, 1986 decision to seek injunctive relief in the courts under Section 12 of the Consumer Product Safety Act, it would not withstand the test of judicial review. I based this on my understanding of the issue and on the CPSC's past track record. Between 1973 and 1984, it appears that the CPSC, in its zeal for safety, regularly overstepped its bounds. During this era, at least nine commission mandatory standards and/or actions banning "hazardous products" were successfully challenged in court. Only two CPSC rules were left totally intact following judicial review.

For example, in 1983, the case of Gulf South Insulation et al v. United States Consumer Product Safety Commission, 701 F. 2d 1137 (5tn Cir. 1983), the Commission's six-year study and rule-making proceeding banning the use of foam insulation in residences and schools was dismissed because the Commission failed to produce the substantial evidence necessary to support its rulemaking. Despite the fact that the ban was later struck down, it nearly destroyed the urea formaldehyde industry and knocked down resale values of American home insulated with this product by $15,000 per home.

In view of comparable safety, the Department of Justice also lost a significant court case in 1987 [U.S. v. General Motors Corp., 656 F. Supp. 1555 (D.C.D.C. 1987)] where the U.S. District Court for the District of Columbia dismissed the complaint filed by the U.S. National Highway Transportation Safety Admininstration (NHTSA) in its effort to recall the GM "X" car. The court found that NHTSA and GM's own data showed that when accidents involving 1980 GM "X" cars, "peer cars" and all other cars made in 1980 were compared, the "X" car was no more hazardous than any other vehicle.

I have an ATV and I fully agree with the Chairman that there are safety concerns to consider during the machines operation. And I am saddened about the 900 ATV deaths that have occurred since 1982. I have always felt that way. However, I am just as concerned about the estimated 1,200 boating deaths that have occurred in 1986 alone. Or the thousand's of automobile fatalities that occur each year.

The answer to this safety question does not lie in bans or recalls that cannot be enforced. Nor does the answer lie even in a voluntary recall. But the solution can be found in substantive education and "hands-on training", elements of the proposed consent decree. I am convinced that we cannot live in a risk-free society nor should the Congress try to micromanage one.

I am of the opinion that if the CPSC, with the assistance of the Justice Department, chooses to litigate the case rather than settle, it may be running itself into a stone wall. Moreover, in a December 30, 1988 press conference, the Department of Justice made the following reference to an enforcement action mandating a recall under Section 12 of the Consumer Product Safety Act:

"The point is that there was a very very substantial issue, an issue of law as to whether or not under this statute . . . that the court . . . [could] grant that kind of relief because . . . there's a very substantial question whether we could indeed prevail on that issue."

In my view, this hearing is potientially disrupting to any future settlement prospects, its direct and indirect effects could force the case to be thrown out of court, and hence destroy all hopes of substantive and expedious safety improvements for ATV operators. I want to go on record of saying that most of the witnesses invited today was of your choosing and the issues they will address is of your choosing. If there is any subject that you feel is sensitive to the case and should not be disclosed to the public at this time, I would appreciate it if you could clarify that matter to the witnesses.

Thank you.

Mr. **Barnard**. Mr. Inhofe.

Mr. **Inhofe**. Thank you, Mr. Chairman.

In looking at the number of people who will be testifying today, I know I won't be able to be here for all of the testimony, but I will try to at least get the written testimony that is submitted so we can have the benefit of all of their views.

I am pleased to be here today to discuss the ATV issue and the proposed consent decree. I would like to commend you, Chairman Barnard, and Vice Chairman Craig, for your tireless efforts to settle this matter. Serious accidents of the past certainly need to be addressed. The well-being and safety of children who ride ATV's must be an overriding concern.

I believe the preliminary consent decree addresses concerns and represents a well thought out plan, a plan when fully implemented will settle the ongoing problems of safety involving ATV's. In my home State of Oklahoma, ATV's are used primarily for farm and agricultural use and not so much for recreational use. It is a matter of livelihood. During the course of the recess, I did go around into 20 different communities, all in rural areas of my Oklahoma district. The farmers of my district tell me the ATV's are the most efficient and economic means of working the land. They are adamant in their support for continued use of ATV's and believe any governmental regulations are unnecessary and represent an intrusion into their lives.

The consent decree calls for a new training program, warning stickers, educational videos for ATV buyers, in some States licensing will be required. Undoubtedly these initiatives will go a long way in addressing the past problems.

Yet some groups continue to push for a recall of ATV's, which in my opinion may actually increase safety problems. A recall would force the manufacturers to buy back ATV's, in effect leading to experienced riders returning their ATV's, only to have them resold to inexperienced riders. Studies show risk of an accident is much greater with new, inexperienced riders.

It is my hope that the language in this proposal will be adopted so that both consumers and ATV manufacturers will be able to cooperate to improve safety for consumers who want to purchase ATV's.

Thank you very much, Mr. Chairman.

Mr. **Barnard**. Thank you. Well, I think from those present today you can see we are going to have a very fair, unbiased hearing on this subject, and you are going to have opinions from both sides which, I think, is very healthy, because no one here today is trying to move toward a unilateral decision.

I am delighted today to have with us three of the many Members of Congress who are concerned about this issue, but these three in particular have shown a very intense interest and we certainly are honored and appreciative to have those Members of Congress with us today. We welcome Senator D'Amato, Representative Florio, and Representative Barton.

Gentlemen, I know your time is scarce this morning and I welcome you here, and I hope that you will give us as much time as you can possibly afford.

Senator D'Amato, I appreciate the position you have taken on this issue. With the permission of the others, we will hear from Senator D'Amato first. Then Congressman Florio and Congressman Barton. And then we will ask all of you, if you have enough time, to stay for a few questions. We would appreciate it very much. Senator, we are delighted to have you here. It seems like we come together on many issues from A to Z in this Congress and it is always a pleasure to work with you. I have found you to be a very helpful person as far as many of the things I have been interested in. Welcome today. We will hear from you at this time.

STATEMENT OF HON. ALFONSE M. D'AMATO, A SENATOR IN CONGRESS FROM THE STATE OF NEW YORK

Mr. D'AMATO. Let me first of all express my appreciation to you for the opportunity to appear before your distinguished subcommittee, particularly with my colleague, Congressman Florio, on the other side of the river, in that magnificent State of New Jersey, who has taken all of our ball teams on the other side, notwithstanding that, he does a great job for consumers. And, of course, Congressman Barton.

Mr. Chairman, let me say that this is the first formal opportunity that the Congress and the public have to comment on the preliminary settlement of the Consumer Product Safety Commission's imminent hazard enforcement case against the all-terrain vehicle (ATV) industry. I thank you for scheduling this hearing before that settlement becomes final on February 13, and for the subcommittee's interest in ATV safety.

Since 1982, ATV accidents have claimed at least 59 lives in New York State—we are second only to California. Nationwide, ATV's have been responsible for more than 900 deaths and over 330,000 serious injuries requiring hospital emergency room treatment.

Mr. Chairman, mention was made about political boondoggling. I am going to come to the point and deviate from my prepared remarks and suggest that in my 20-plus years in Government I know when I see a political boondoggle. I know when I see those who are charged with the responsibility of carrying out the important business of Government, move to the political expedience and the power brokers in the District of Columbia in particular. I have to tell you we should commend the ATV manufacturers, the Japanese manufacturers, because the ATV companies are primarily Japanese based, for their outstanding choice as it relates to the representation that they have. And millions of dollars they have paid in legal fees have been well worth it, because I want to tell you nobody could dictate a better settlement than the attorneys representing the ATV industry. I have to tell you they have scored a stunning victory over the interests of the consumers and the people of this Nation. I have to tell you in my opinion they certainly had a willing accomplice in someone who worked with them diligently to bring this tragic situation to a point where the Commission is ready to finalize this settlement.

Mr. Chairman, if I could believe that the Federal Government's ATV settlement would help to reduce the imminent hazard that ATV's pose to consumers, especially to children, I would not be testifying before you today. If I were convinced that the CPSC and the Justice Department had fought a tough legal battle or had engaged in serious negotiations to achieve the greatest degree of consumer protection possible without years of litigation, I would not be here today. Unfortunately, this settlement is a sham and the American public deserves to know it. It is nothing less than a "Bill of Rights" for the Japanese-based ATV manufacturers and an insult to American consumers. It would be an insult to anyone who has had any legal training whatsoever, and who has followed the details of this case, to suggest that this matter has been hard fought. It is a travesty.

I have here, Mr. Chairman, a copy of the so-called "safety verification form." I will tell you that this form is nothing more than a liability release form. It says to the consumer who purchased an ATV that, in the future, we are going to make it almost impossible for you to bring any kind of lawsuit because we have had you sign away all your rights. Any Justice Department, any legal authority, that would countenance this kind of thing doesn't deserve to call themselves lawyers, certainly not lawyers representing the people of this country. What a debacle.

When you buy an ATV in the future you will have to say, among other things, and I will just read some of them—that I understand many different warnings—by the way, it says failure to obey these warnings could result in death or severe personal injury. That is terrific. It says I must never allow a child under so many years old to drive this ATV. Implicit in that is if someone under that age drives the ATV and is killed or injured that the manufacturer and dealer will be relieved of any liability. "Never attempt to drive an ATV without proper instruction, taking a training course, beginning drivers should receive training from a certified instructor. Never attempt to drive an ATV until you have read all the owner's manuals. Never lend my ATV to anyone who has not taken a training course." I mean this is really ridiculous.

Could you imagine little Johnny Jones, whose parents have signed this form, he is out on the farmland or wherever with his ATV, but he is not going to let his best friend ride or get on top of it? And it goes on and says, never give anyone a ride on an ATV. Little Johnny Jones lets his friend drive it, his friend gets into an accident, if anything, this form makes it possible for suit to be brought against Johnny's parents, but we relieve the manufacturer of any liability. "Never drive an ATV after consuming alcohol or drugs, never carry a passenger, never drive an ATV on the pavement, the vehicle is not designed to be used on pavement"—now, seriously, children are really going to listen to this. What we are doing is giving an indemnification and a release from liability and from suit against the manufacturers. This represents the interests of the people? What people? It represents the interests of the manufacturers; Consumer Product Safety Commission, my foot.

"Never drive an ATV on the public road, even a dirt or gravel one, because I may not be able to avoid colliding with other vehicles." Also, "driving on a public road with an ATV may be against the law." I want to tell you something, counsels who represent the ATV manufacturers ought to be commended, and, as a matter of fact, I hope that—they should be paid well. I don't know anybody who could do a better job than this. And the Justice Department, my dear friends, where are you? How could you really allow and advise this type which really works against the interests of consumers to be included? "I understand all the warnings above and failure to obey those warnings may result in death or severe body injury."

Imagine the consumer has to sign this when he purchases an ATV, and of course, when Johnny Jones' father goes in to buy an ATV, is he really going to care about this? He is going to be in that store, sign this form and now, if there is an accident, if there is a deficiency, the form will be used as evidence against him. Now, that is not something that seems to me to be hard-fought. If we worked hard to obtain this, and we should have just forgotten it. It is a travesty, Mr. Chairman.

The manufacturers have waltzed away with a package that will provide them with litigation insurance for the years of individual court battles that are ahead. There were no real negotiations here. The settlement is virtually identical to the first offer made by the Japanese manufacturers in a letter to CPSC on December 3, 1987, not much more than that same offer was obtained. In fact, the settlement contains less than what the American ATV manufacturer, Polaris of Minnesota, offered in a separate letter on that same date. It is a stunning victory for the Japanese-based ATV companies.

Let's look at the facts. The settlement does not include consumer refunds for three-wheeled ATV's or adult-sized ATV's bought for use by children under age 16. It does not do a thing for the consumer in that regard. It falls far short of the relief authorized by the Commission in December 1986, and the complaint filed by the Justice Department last December. Consumer refunds are the only effective means for keeping children off adult-sized ATV's. Ninety percent of ATV riders aged 12 to 15 ride adult-size ATV's. Nearly half of the ATV injuries and deaths are to children under age 16.

This sorry settlement does nothing for the thousands of American children who are going to be killed and maimed by these products. CPSC's own data show that if three-wheeled ATV's were eliminated and ATV's were operated only by adults, this could save 100 lives and 60,000 injuries per year. The consumer refunds, dropped from this settlement, would have gone a long way toward making this happen.

Dropping the demand for refunds is outrageous when the only major American manufacturer—Polaris—had agreed to provide a $600 credit. Here we have an American company willing to take responsible action, while the Japanese-based companies whose ATV's constitute the lion's share of products in the United States are unwilling to do this. Perhaps more shocking is that the Federal agencies charged with protecting consumers were unwilling to fight for them.

Instead of assuming responsibility for tackling the enormous concerns raised by ATV death and injury data, the CPSC majority—with the exception of Commissioner Anne Graham—voted for this inadequate settlement. Let me take a moment to say Commissioner Graham is worthy of praise. Unfortunately her decision will probably subject her to further harassment. She has not shirked her job, she has stood up to pressure because she truly understands and has followed the ATV issue, not in the superficial, glib manner that has been put forth by the proponents of this incredible settlement. So there is a friend of the consumer, possibly we can get one more over at CPSC so this settlement won't be a bigger giveaway than the Publisher's Clearing House Sweepstakes. In my opinion, that is what this represents.

I could go on, Mr. Chairman, but I am going to ask that the balance of my remarks be included in the record as read in their entirety. My two colleagues have been waiting patiently and I do have a vote at 10:30. Let me simply say this: I will be introducing legislation today—the Emergency All-Terrain Vehicle Safety Act—dealing with this preliminary settlement. I will be working with Congressman Florio and we will look to work with you so we can dual track that legislation, so we can really work for the benefit of consumers and not for the special interest groups that have dominated this settlement. This settlement brings about a great victory for those groups and little, if any, as it relates to the safety of the American public and our children, in particular. Thank you.

[The prepared statement of Mr. D'Amato follows:]

STATEMENT OF SENATOR ALFONSE M. D'AMATO
SETTLEMENT OF THE ALL-TERRAIN VEHICLE CASE
HEARING BEFORE THE HOUSE SUBCOMMITTEE ON COMMERCE, CONSUMER, AND MONETARY AFFAIRS
JANUARY 28, 1988

MR. CHAIRMAN, I APPRECIATE THIS OPPORTUNITY TO APPEAR BEFORE THE DISTINGUISHED MEMBERS OF THIS SUBCOMMITTEE.

I AM PLEASED TO BE HERE WITH MY COLLEAGUES CONGRESSMAN FLORIO AND CONGRESSMAN BARTON TO DISCUSS THE DECEMBER 30, 1987 SETTLEMENT OF THE U.S. CONSUMER PRODUCT SAFETY COMMISSION'S IMMINENT HAZARD CASE AGAINST THE MANUFACTURERS OF ALL-TERRAIN VEHICLES (ATVS). THIS IS THE FIRST FORMAL OPPORTUNITY THAT CONGRESS AND THE PUBLIC HAVE HAD TO COMMENT ON THE SETTLEMENT. I COMMEND YOU FOR SCHEDULING THIS HEARING BEFORE THE SETTLEMENT BECOMES FINAL ON FEBRUARY 13, AND FOR THE SUBCOMMITTEE'S LONG-STANDING INTEREST IN ATV SAFETY.

SINCE 1982, ATV ACCIDENTS HAVE CLAIMED AT LEAST 59 LIVES IN NEW YORK STATE -- WE ARE SECOND ONLY TO CALIFORNIA. NATIONWIDE, ATVS HAVE BEEN RESPONSIBLE FOR MORE THAN 900 DEATHS AND OVER 330,000 SERIOUS INJURIES REQUIRING HOSPITAL EMERGENCY ROOM TREATMENT.

IF I COULD BELIEVE THAT THE FEDERAL GOVERNMENT'S ATV SETTLEMENT WOULD HELP TO REDUCE THE IMMINENT HAZARD THAT ATVS POSE TO CONSUMERS, ESPECIALLY TO CHILDREN, I WOULD NOT BE TESTIFYING BEFORE YOU TODAY. IF I WERE CONVINCED THAT THE CPSC AND THE JUSTICE DEPARTMENT HAD FOUGHT A TOUGH LEGAL BATTLE OR HAD ENGAGED IN SERIOUS NEGOTIATIONS TO ACHIEVE THE GREATEST DEGREE OF CONSUMER PROTECTION POSSIBLE WITHOUT YEARS OF LITIGATION, I WOULD NOT BE HERE TODAY. UNFORTUNATELY, THIS SETTLEMENT IS A SHAM AND THE AMERICAN PUBLIC DESERVES TO KNOW IT. IT IS NOTHING LESS THAN A "BILL OF RIGHTS" FOR THE JAPANESE-BASED ATV MANUFACTURERS AND AN INSULT TO AMERICAN CONSUMERS.

THE MANUFACTURERS HAVE WALTZED AWAY WITH A PACKAGE THAT WILL PROVIDE THEM WITH LITIGATION INSURANCE FOR THE YEARS OF INDIVIDUAL COURT BATTLES THAT ARE AHEAD. THERE WERE NO REAL NEGOTIATIONS HERE. THE SETTLEMENT IS VIRTUALLY IDENTICAL TO THE FIRST OFFER MADE BY THE JAPANESE MANUFACTURERS IN A LETTER TO CPSC ON DECEMBER 3, 1987. IN FACT, THE SETTLEMENT CONTAINS LESS THAN WHAT THE AMERICAN ATV MANUFACTURER, POLARIS OF MINNESOTA, OFFERED IN A SEPARATE LETTER ON THAT SAME DATE. IT IS A STUNNING VICTORY FOR THE JAPANESE-BASED ATV COMPANIES.

LET'S LOOK AT THE FACTS. THE SETTLEMENT DOES NOT INCLUDE CONSUMER REFUNDS FOR 3-WHEELED ATVS OR ADULT-SIZED ATVS BOUGHT FOR USE BY CHILDREN UNDER AGE 16. IT FALLS FAR SHORT OF THE RELIEF AUTHORIZED BY THE COMMISSION IN DECEMBER OF 1986, AND THE COMPLAINT FILED BY THE JUSTICE DEPARTMENT LAST DECEMBER.

CONSUMER REFUNDS ARE THE ONLY EFFECTIVE MEANS FOR KEEPING CHILDREN OFF ADULT-SIZED ATVS: 90% OF ATV RIDERS AGED 12 TO 15 RIDE ADULT SIZE ATVS. NEARLY HALF OF THE ATV INJURIES AND DEATHS ARE TO CHILDREN UNDER AGE 16.

THIS SORRY SETTLEMENT DOES NOTHING FOR THE THOUSANDS OF AMERICAN CHILDREN WHO ARE GOING TO BE KILLED AND MAIMED BY THESE PRODUCTS. CPSC'S OWN DATA SHOW THAT IF 3-WHEELED ATVS WERE ELIMINATED AND ATVS WERE OPERATED ONLY BY ADULTS, THIS COULD SAVE 100 LIVES AND 60,000 INJURIES PER YEAR. THE CONSUMER REFUNDS, DROPPED FROM THIS SETTLEMENT, WOULD HAVE GONE A LONG WAY TOWARD MAKING THIS HAPPEN.

DROPPING THE DEMAND FOR REFUNDS IS OUTRAGEOUS WHEN THE ONLY MAJOR AMERICAN MANUFACTURER -- POLARIS -- HAD AGREED TO PROVIDE A $600 CREDIT. HERE WE HAVE AN AMERICAN COMPANY WILLING TO TAKE RESPONSIBLE ACTION, WHILE THE JAPANESE-BASED COMPANIES WHOSE ATVS CONSTITUTE THE LION'S SHARE OF PRODUCTS IN THE UNITED STATES ARE UNWILLING TO DO THIS. PERHAPS MORE SHOCKING IS THAT THE FEDERAL AGENCIES CHARGED WITH PROTECTING CONSUMERS WERE UNWILLING TO FIGHT FOR THEM.

INSTEAD OF ASSUMING RESPONSIBILITY FOR TACKLING THE ENORMOUS CONCERNS RAISED BY ATV DEATH AND INJURY DATA, THE CPSC MAJORITY -- WITH THE EXCEPTION OF COMMISSIONER ANNE GRAHAM -- SHIRKED THEIR DUTY BY RUNNING TO GIVE THE INDUSTRY THE KEYS TO THE STORE. THIS SETTLEMENT IS A BIGGER GIVEAWAY THAN THE PUBLISHERS' CLEARINGHOUSE SWEEPSTAKES!

DEFENDERS OF THIS SETTLEMENT CLAIM THAT REFUNDS ARE TOO EXPENSIVE. REALLY? EACH YEAR, SINCE 1985, WE HAVE SPENT OVER A BILLION DOLLARS ON ATV DEATHS AND INJURIES. LAST YEAR ATV COMPANIES SOLD ABOUT 500,000 NEW ATVS AT AN AVERAGE PRICE OF $2,000. INSTEAD OF REFUNDS, CHAIRMAN SCANLON SAYS THAT "HARDHEADED NEGOTIATIONS" RESULTED IN A SETTLEMENT THAT IS IN THE PUBLIC INTEREST. WHAT DID THE PUBLIC GET? LET'S LOOK.

THE SETTLEMENT REQUIRES CONSUMERS TO SIGN WHAT AMOUNTS TO A MANUFACTURERS' AND DEALERS' LIABILITY RELEASE FORM WHEN THEY PURCHASE AN ATV. IT PROVIDES FOR A WATERED-DOWN FORM NOTICE FROM THE MANUFACTURERS TO DEALERS AND CONSUMERS THAT DOES NOT EMPHASIZE THE HAZARDS TO KIDS. IT INCLUDES A PUBLIC AWARENESS CAMPAIGN THAT IS NOT SPELLED-OUT TO INDICATE IF IT WILL APPROACH THE TYPE OF EXPENSIVE, "WORLD SERIES" PRIME-TIME HYPE THAT INDUCED MILLIONS OF CONSUMERS TO BUY ATVS FOR "FAMILY FUN." TRAINING COURSES PROVIDED FOR ARE UNLIKELY TO ATTRACT SUFFICIENT NUMBERS OF RIDERS BECAUSE NO INCENTIVES ARE PROVIDED TO INDUCE THEM TO TAKE THE COURSES. AND THE CROWNING ACHIEVEMENT OF THE SETTLEMENT -- THE "STOP-SALE" OF 3-WHEELERS -- IS NOT A STOP SALE, IT IS AT BEST A BRIEF MORATORIUM. ONE DAY AFTER THE SETTLEMENT WAS FILED, AMERICAN HONDA STATED THAT IT WOULD STORE THE 3-WHEELERS RETURNED BY DEALERS AND EXPECTED TO BE ABLE TO SELL THEM AGAIN IN SEVERAL MONTHS!

SOME OF THOSE WHO APPEAR BEFORE YOU TODAY WILL SAY THAT THE SETTLEMENT REPRESENTS THE ONLY ALTERNATIVE TO YEARS OF

PROTRACTED, COSTLY LITIGATION AND THAT IT IS THE MOST PROTECTION THAT COULD BE OBTAINED FOR THE LEAST AMOUNT OF TIME AND MONEY. THIS IS NONSENSE! THIS SETTLEMENT IS NOT THE MOST FOR THE LEAST, BUT THE LEAST FOR THE LONGEST AMOUNT OF TIME.

THE CPSC HAS BEEN "ANALYZING" THE ATV PROBLEM SINCE 1984. SINCE THAT TIME THERE HAVE BEEN 20 DEATHS AND 7,000 INJURIES PER MONTH ON ATVS. CPSC'S IMMINENT HAZARD CASE LANGUISHED AT JUSTICE FROM FEBRUARY 1987 UNTIL DECEMBER 11, 1987 WHEN JUSTICE DECLARED THAT IT WAS PREPARED TO IMMEDIATELY FILE SUIT SEEKING ALL THE RELIEF AUTHORIZED BY THE CPSC INCLUDING CONSUMER REFUNDS. SCANLON, THROUGH SUCH ACTIONS AS REMOVING THE TWO LEAD ATTORNEYS FAMILIAR WITH THE CASE, MADE SURE THAT THERE WOULD BE NO QUICK MOVEMENT ON THE LITIGATION UNTIL A DEAL SUITABLE TO THE INDUSTRY COULD BE WORKED OUT. MEANWHILE, THE ATV INDUSTRY CONTINUED TO PUSH THEIR ATV INVENTORIES ON UNSUSPECTING CONSUMERS.

MR. CHAIRMAN, YOUR SUBCOMMITTEE IS CONCERNED ABOUT MAKING CERTAIN THAT FEDERAL AGENCIES FUNCTION PROPERLY. THE CPSC, AT THE DIRECTION OF SCANLON, CLEARLY IS NOT DOING ITS JOB. THE STATES AND CONGRESS NOW MUST STEP IN. A BILL HAS RECENTLY BEEN PROPOSED IN NEW YORK STATE TO BAN ATVS. I WILL BE INTRODUCING LEGISLATION TODAY -- THE EMERGENCY ALL-TERRAIN VEHICLE SAFETY ACT -- WHICH INCLUDES REFUNDS TO CURE THE PROBLEMS THE CPSC HAS CREATED WITH THIS SETTLEMENT. MOREOVER, MY COLLEAGUES AND I ON THE SENATE APPROPRIATIONS COMMITTEE

WILL AGAIN BE GIVING CPSC A LONG HARD LOOK WHEN THE AGENCY'S APPROPRIATIONS COME UP THIS YEAR.

LATER THIS MORNING YOU WILL HEAR FROM FORMER COMMISSIONERS DAVID PITTLE AND STUART STATLER. IF EITHER OF THESE GENTLEMEN WERE NOW CHAIRING CPSC, I AM CERTAIN THAT THIS DEBACLE OF A SETTLEMENT WOULD NOT HAVE COME ABOUT.

THANK YOU, MR. CHAIRMAN.

Mr. Barnard. Thank you very much for an excellent statement, well prepared, well presented, and of course without objection your entire statement will be entered into the record.

Another of our colleagues who has maintained a vigilant interest in this matter from the very beginning is Congressman Florio of the Energy and Commerce Committee. I appreciate the hearings that he has given this subject and the statements that he has made, and I am appreciative that you are here today.

Jim, in your role as chairman of the important Subcommittee on Commerce, Consumer Protection, and Competitiveness, we would like to hear from you at this time.

If you gentlemen will suspend a minute.

Mr. Craig. Thank you, Mr. Chairman. I wanted to extend my appreciation to Chairman Florio. I have been before his committee on numerous occasions on this issue. We differ in our viewpoint, but he has been kind and courteous in allowing me to testify.

STATEMENT OF HON. JAMES J. FLORIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Florio. Thank you very much. Mr. Chairman, I am pleased to be here with my colleagues and want to pay appropriate congratulations to you for the role that you and your committee and Mr. Craig, in particular, have played in this issue. The work that you have done has been very helpful to our committee as we have tried to go forward with reauthorizing legislation for the Consumer Product Safety Commission in general, trying to focus on some of the specific problem areas, one of which, of course, is the subject of today's hearing, most particularly the recent preliminary settlement that has been entered into by the foreign manufacturers of these vehicles and the Justice Department.

In the interest of conserving the committee's time, I would ask that my statement be put into the record in its entirety. I will try to summarize it.

Mr. Barnard. Without objection, it will be done.

Mr. Florio. Mr. Chairman, this settlement I feel is deficient. It simply abandons the interest and the safety of the 1.5 million current ATV owners and fails to address a very critical element of this problem. As was stated by my colleague from the Senate, it fails to offer any meaningful relief to the estimated 1.5 million purchasers who were, in fact, deceived into thinking they were purchasing safe vehicles when, in fact now, by even the terms of the agreement, as well as the findings of the Consumer Product Safety Commission, it is clear these are not safe vehicles, that these are described as imminent hazards—I don't have to take a lot of time, all I have to do is read one of the paragraphs out of the Government's complaint which was filed, that says that the risk of harm presented by ATV's is both imminent and unreasonable.

Each time an ATV is operated, a rider, who is not aware of the unique handling characteristics of the vehicle faces an unreasonably and unacceptably high risk that at any moment with no sign of impending danger he or she will either be killed or suffer severe personal injury. Defendants have falsely and deceptively promoted ATV's as safe, easy to operate vehicles for the entire family. Defendants have created the allusion ATV's can easily and safely go anywhere when, in fact, operation on some types of terrain is extremely dangerous; yet despite this consensus that has clearly grown around the Nation on the dangers of these vehicles, the purported ban on the future sale of three-wheeled ATV's offers absolutely nothing concrete for those who have bought those vehicles in the past thinking it was safe when they purchased it and now are finding that is not the case.

The failure of the Commission and the Justice Department to insist on a refund provision is all the more tragic, I think, when we realize this failure could mean more deaths and injuries in the future that could have been avoided, particularly to those who are out there with the 1.5 million vehicles that are purported to be banned for sale in the immediate future.

Now, the Consumer Product Safety Commission and the Justice Department argue that they did not pursue a refund remedy against the foreign manufacturers because it would be a difficult legal battle. Yet according to reports, as was represented by the Senator, one American manufacturer of ATV's, Polaris, did offer the Consumer Product Safety Commission to provide a trade-in allowance to encourage existing owners of three-wheeled ATV's to trade in their vehicles. Because of the failure of the Consumer Product Safety Commission to adequately protect past purchasers of three-wheeled ATV's, we will need to look at other ways to achieve justice for American consumers.

As you know, Mr. Chairman, you and Mr. Craig have been very helpful to us in my committee as we have attempted to draft legislation to deal with the Consumer Product Safety Commission deficiencies and specifically to focus on the ATV problem. Last November my committee with a bipartisan 11 to 4 margin reauthorized legislation for the Consumer Product Safety Commission, which will include a provision requiring a refund or similar remedy for past purchases of three-wheeled ATV's.

My colleague and friend from Texas, Mr. Barton, has played a very key role in drafting that legislation and has some very constructive ideas about how to strengthen that provision and I am looking forward to hearing his comments today and to working with him to try to do that.

Let me conclude, Mr. Chairman, by focusing on some other aspects of the settlement that I think have to be focused on. Of major concern, of course, is what it doesn't contain, the refund provision, but there are other problems with provisions that are included in the settlement agreement. This complaint filed by the Justice Department at the urging of the Consumer Product Safety Commission makes much of the deceptive practices of the manufacturers, yet the initial press statements by the Consumer Product Safety Commission and the Justice Department are themselves highly deceptive, suggesting the settlement achieved a ban on three-wheeled ATV's.

For example, a Justice Department press release describes the settlement as ending the sale of all three-wheel ATV's. I should note that the magnitude of this victory by the Consumer Product Safety Commission is rather small. As an advocate pointed out recently in USA Today, the objective of the bans of three-wheelers is not even available for the 1988 model year, yet a close examination of the consent decree reveals this is really a nonban.

According to the decree, the Consumer Product Safety Commission and the ATV manufacturers ought to attempt to reach agreement on voluntary standards on ATV's over a 4-month period with no provision, by the way, for public or consumer input. And if the three-wheel ATV's meet these privately negotiated, undefined standards, whatever they are, the three-wheelers can again be sold. And what do the manufacturers have to say about this provision?

Let me quote from a recent article in the Washington Post where a spokesman for American Honda, which has been the leading ATV seller, said the provision in the decree I just made reference to allows the renewed sales of these vehicles after a safety commission sets certain standards and said that their return is definitely a real possibility. The Honda spokesman then said his firm will store the 18,000 three-wheeled models currently in dealer inventories in hopes of returning them to the market with governmental approval in a few months.

A spokesman for Yamaha, another major importer of the vehicles, describes the court decree as a moratorium and said his firm also hopes to have these vehicles back on sale after minor modifications. So much for the ban on these vehicles.

Furthermore, the preliminary consent decree not only resolves the CPSC's current case against ATV's, but I am concerned that it would significantly tie the Commission's hands in the future. Here again, the descriptions by the Commission and the Justice Department of what the settlement does and what the actual text of the decree says is radically different.

According to the Chairman of the Consumer Product Safety Commission, he says that the settlement allows you to pursue, repurchase, or recall if current remedies do not reduce death and injuries. If that were true, I would have much less concern, but let us look at what the settlement really says, what the language says:

> The Consumer Product Safety Commission reserves the right to seek a recall under Section 15 of the Consumer Product Safety Act, if it determines 12 months or more subsequent to the court's approval of the final consent decree that new and substantial evidence indicates that a further and more extensive remedy, including recall or repurchase, is warranted.

Therefore, even if there is no decline in deaths or injuries after this settlement, the Consumer Product Safety Commission could not seek a recall until it waited at least 1 year and unless there was new and substantial evidence. The consent decree is silent on whether the lack of an adequate decline in deaths or injuries constitutes the requisite new and substantial evidence. So what we can see is that at the end of this year nothing has happened, there have been no decline in deaths. There is no definition as to what it takes for the agency to find new evidence so as to allow the vehicles also to go out to consumers again.

While the settlement establishes age limits for ATV's with engine sizes of 70 cc's and larger, it fails to address appropriate age limits for smaller engine sizes. Thus it would implicitly endorse current industry practices, which is to allow children under 12, indeed as young as 6, to ride ATV's with smaller engines. And, finally, much of the preliminary consent decree is exceedingly vague and arguably unenforceable. For example, the manufacturers agreed to develop "a public awareness campaign" including radio and TV commercials. Yet there are no details. How much television, what stations, and what time of day. These questions are unanswered. As another example, on training, the manufacturers agreed to make every effort to establish a pool of 1,000 trained instructors within 6 months of the court's final approval. Unfortunately, we have heard similar promises from the industries about training in the past.

Unenforceability is a key issue. How does one enforce a provision requiring the companies to make every effort? Maybe some of this vagueness will be cleared up in the final decree. But as it stands now, these provisions are almost meaningless.

Thus, not only is the settlement sorely lacking any relief for deceived past patterns, but it has some very troublesome provisions in it. I would be happy to work with this committee, as I know my colleagues would, to try to point out some of the deficiencies in this decree process, but more significantly to try to move in a direction that is going to finally solve the problems associated with the inadequate approach of the Consumer Product Safety Commission to this particular product; and also to all other products.

Mr. Chairman, thank you very much for the opportunity to say a few words here.

[The prepared statement of Mr. Florio follows:]

Testimony of
The Honorable James J. Florio
Chairman, House Subcommittee on Commerce,
Consumer Protection and Competitiveness
Before the
House Subcommittee on
Commerce, Consumer and
Monetary Affairs

Regarding All-Terrain Vehicles

Thursday, January 28, 1988
9:30 A.M.
Room 2154 Rayburn House Office Building

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to testify today regarding the recent preliminary settlement between the Consumer Product Safety Commission and the foreign manufacturers of all-terrain vehicles. I want to particularly commend the Chairman of the Subcommittee both for his long standing leadership role in calling the public's attention to the serious dangers presented by ATVs and in scheduling this timely hearing.

Unfortunately, the settlement abandons the safety of 1.5 million ATV owners and completely fails to address a crucial element of the ATV problem. It fails to offer any meaningful relief for the estimated 1.5 million past purchasers of three wheel ATVs -- many of whom were deceived into purchasing these admittedly dangerous vehicles. They saw the advertisements and thought ATVs were not only fun, but safe. Ironically, the complaint prepared by the government explains this case well --

> "The risk of harm presented by ATVs is both imminent and unreasonable. Each time an ATV is operated, a rider who is not aware of the unique handling characteristics of the vehicle ... faces an unacceptably high risk that, at any moment and with no sign of impending danger, he or she will either be killed or suffer a severe personal injury ... defendants have falsely and deceptively promoted ATVs as safe, easy-to-operate vehicles for the entire family...Defendants have created the illusion that ATVs can easily and safely 'go anywhere,' when in fact ATV operation on some types of terrain is extremely hazardous."

Even the foreign ATV manufacturers, by their words and deeds, have begun to admit what we all know -- that three wheel ATVs are dangerous. For example, a representative of Suzuki recently admitted that three wheelers "are more dangerous. Safety wise, three-wheelers are not good."

Yet, despite the consensus on the dangers of these vehicles, and a purported ban on future sales of three wheel ATVs, the settlement offers absolutely nothing concrete for those who bought a three wheeler in the past, thinking it was safe, and now finding out that's not the case. The failure of the CPSC and the Justice Department to insist on a refund provision is all the more tragic when we realize that this failure will mean deaths and injuries in the future, deaths and injuries that could be avoided.

If we really want to improve ATV safety and reduce deaths and injuries, we need to offer the opportunity to current three wheel ATV owners to turn in their dangerous vehicles. Undoubtedly, some current owners would choose to retain their vehicles, and that is their right. But, there are undoubtedly many who, if given the opportunity, and lack of disincentives, would return the vehicle for an appropriate refund. But, with the CPSC saying "tough luck," and fearful of losing their significant monetary investment, these owners may well continue using their three wheelers at great risk to themselves. Under the circumstances, it only seems fair that the deceptive manufacturers, and not the deceived American consumer, bear the cost of the manufacturer's deliberate deception.

And, if anyone doubts the willfulness of the ATV manufacturers' deception of the American consumer, let us look at the case of Honda and U-Haul. In 1984, U-Haul purchased Honda three wheel ATVs (then called an ATC) for purposes of renting to consumers, just as U-Haul rents trucks. However, unlike Honda, U-Haul believed in informing its consumers of the dangers involved. In fact, U-Haul developed its own warning label, with a skull and cross-bones and very dramatic warnings, such as "ATC's flip every which way" and "ATC's corner strangely."

But what was Honda's reaction? In a word, apoplexy. As one Honda lawyer wrote to his colleagues "it may be beneficial to immediately contact the individuals at U-haul's home office in Phoenix in an effort to talk with them and get them lined up in a manner consistent with the Honda position." Honda wrote to U-Haul protesting that it was "misleading and untrue to say that ATCs 'flip over'" and demanding "in the strongest possible way that your company remove these labels immediately." In the end, perhaps out of frustration with Honda's attitude, U-Haul ceased renting Honda ATVs.

Now, the CPSC and the Justice Department argued that they did not pursue a refund remedy against the foreign manufacturers because it would be a difficult legal battle. Yet, according to reports, the one American manufacturer of ATVs, Polaris, did offer the CPSC to provide a trade-in allowance to encourage existing owners of three-wheel ATVs to trade in their vehicles. While it would be unfair to Polaris to hold it to an offer its foreign competitors were unwilling to make, the apparent failure of the CPSC to use the Polaris offer as leverage on the foreign manufacturers is shocking.

I think it's instructive to draw some comparisons between Polaris and its competitors. Not only was Polaris apparently willing to offer some relief to past purchasers, but its past conduct was also far more responsible than its foreign competition. Polaris manufactured fewer than 2000 three wheel ATVs but discontinued them two years ago. They were designed more as utility vehicles than as recreational vehicles and with better safety features, such as full suspensions and floorboards. Furthermore, Polaris has emphasized that its ATVs are only intended for adults age 18 and over. It certainly is interesting to compare the relatively responsible behavior of the American company with the utterly irresponsible behavior of its foreign competition, and the almost total failure of the CPSC to capitalize on that distinction.

Because of the failure of the CPSC to adequately protect past purchasers of three wheel ATVs, we will need to look at other ways to achieve justice for American consumers. As you know, the Subcommittee I chair approved last November, by a bipartisan 11-4 vote, reauthorization legislation for the CPSC which includes a provision requiring a refund or similar remedy for past purchasers of three wheel ATVs. The gentleman from Texas (Mr. Barton) has some very constructive ideas about strengthening this provision. I look forward to working with him and the other members of the Subcommittee to develop an effective remedy for those the CPSC has abandoned.

The inability of the CPSC to achieve an effective remedy in the ATV situation also points out the need for other legislative changes to improve the CPSC's effectiveness, such as those contained in the CPSC reauthorization bill. In particular, let us not forget the role of the Chairman of the CPSC in this sad affair. From the beginning, he opposed justice for deceived ATV consumers. And he has apparently succeeded in getting his way, at least at the CPSC. Perhaps his well known abuses of authority, such as when he removed the two experienced attorneys from the ATV case over the objections of his two colleagues, helped to intimidate and wear down those who had the consumers' best interest at heart.

Let me also make a few comments about other aspects of the preliminary consent decree. Of course, the major problem is what it doesn't contain. But, there are also problems with some of its provisions.

The complaint filed by the Department of Justice and the CPSC makes much of the deceptive practices by the manufactures. Yet, the initial press statements by the CPSC and Justice were themselves highly deceptive, suggesting that the settlement achieved a ban on three wheel ATVs. For example, a Justice Department press release described the settlement as "ending the sale of all three-wheeled ATVs."

I should note that the magnitude of this "victory" by the CPSC is rather small. As an ATV advocate pointed out recently in USA Today, "The object of the ban, three-wheelers, are not even available for the 1988 model year." Yet, a close examination of the consent decree reveals that this is really a "non-ban ban." According to the decree, the CPSC and the ATV manufacturers are to attempt to reach agreement on voluntary standards for ATVs over a four month period - with no provision for public or consumer input. And, if three wheel ATVs meet these privately negotiated standards -- whatever they are - three wheelers can again be sold.

And what do the manufacturers have to say about this provision? Let me quote from a recent article in the Washington Post:

> A spokesman for American Honda Motor Corp., which has been the leading ATV seller, however, cited a provision in the decree that allows renewed sales of the three-wheeled ATVs after the safety commission sets certain standards, and said their return is 'definitely a real possibility.'
>
> Kurt Antonius, the Honda spokesman, said his firm will store the 18,000 three-wheel models currently in dealer inventories in hopes of returning them to the market with government approval in several months.
>
> A spokesman for Yamaha Motor Corp., another major importer of the off-the-road vehicles, described the court decree as a 'moratorium' and said his firm also hopes to have the three-wheel models back on sale after minor modifications.

So much for the "ban" on three wheelers.

Furthermore, the preliminary consent decree not only resolves the CPSC's current case against ATVs but it would significantly tie the Commission's hands in the future. Here again, the descriptions by the CPSC and Justice Department of what the settlement does and the actual text of the preliminary consent decree differ radically. According to Chairman Scanlon of the CPSC, "the settlement allows us to pursue repurchase or recall if current remedies do not reduce deaths and injuries." If this were true, perhaps the settlement wouldn't be so bad. But let us look at what the settlement really says: The CPSC reserves the right to seek a recall under section 15 of the Consumer Product Safety Act "if it determines, 12 months or more subsequent to the Court's approval of the final consent decree, that new and substantial evidence indicates that a further and more extensive remedy, including recall or repurchase, is warranted." Therefore, even if there is no decline in deaths and injuries after this settlement, the CPSC could not seek a recall until it waited one year and unless there were "new and substantial evidence". The consent decree is silent on whether the lack of an adequate decline in deaths and injuries constitutes the requisite "new and substantial evidence."

While the settlement establishes age limits for ATVs with engine sizes of 70 cc's and larger, it fails to address appropriate age limits for smaller engine sizes. Thus, it would implicitly endorse current industry practice which is to allow children under twelve -- indeed, as young as six -- to ride ATVs with smaller engines.

Finally, much of the preliminary consent decree is exceedingly vague and arguably unenforceable. For example, the manufacturers agree to develop "a public awareness campaign," including radio and television commercials. Yet, there are no details. How much television? What stations? At what time of day? These questions are unanswered.

As another example, on training, the manufacturers "agree to make every effort to establish a pool of 1,000 trained instructors within 6 months" of the court's final approval. Unfortunately, we've heard similar promises from the industry about training in the past. That is why enforceability is a key issue. Yet, how does one enforce a provision requiring the companies to "make every effort?" Maybe some of this vagueness will be cleared up in the final decree, but as they stand, these provisions are almost meaningless.

Thus, not only is the settlement sorely lacking any relief for deceived past purchasers, but it also has some very troublesome provisions. Whatever the outcome of the negotiations to produce a final settlement agreement, I pledge my efforts and those of the Subcommittee to work for true safety protections for consumers of ATVs.

Mr. BARNARD. Thank you very much. Thank you for the time and interest you have given as well as your testimony today.

I would like to interject at this particular point that I hope there is not going to be a feeling that we have tried to be unfair with the witnesses here today. I want to note again we have offered an opportunity for the manufacturers to be present and discuss this settlement—they refused to come. We offered an opportunity for the Justice Department to come and talk about their role in the settlement, and they have refused to come. So I just want for the record to indicate we did endeavor to present as well-balanced a hearing today as possible. I want you to know that that did occur.

I think it also should be noted that not only has this matter been of tremendous interest from both Houses of the Congress, but from both aisles of the Congress, and so today we welcome another Member of Congress from Texas, Representative Joe Barton. Joe, we appreciate your interest in this subject and we would like to hear your contribution to this hearing this morning.

STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Thank you, Mr. Chairman, and members of the subcommittee. I appreciate the opportunity to testify before you today about the recent proposed settlement between the Consumer Product Safety Commission and the foreign manufacturers of all-terrain vehicles, which we call ATV's.

I share Senator D'Amato's, Chairman Florio's and the distinguished chairman of the subcommittee's longstanding concerns about the imminent dangers of ATV's. To quote the Consumer Product Safety Commission's (CPSC) December 12, 1986, response, "ATV's present an imminent and unreasonable risk of death, serious injury or severe personal injury." I commend the chairman for scheduling today's timely hearing to discuss the preliminary consent decree.

I believe the proposed Justice Department's settlement takes many positive steps in the right direction. The settlement was too long in the making but is a major victory for consumers. I applaud the CPSC and Justice for the progress they have made.

Having ATV companies stop selling three-wheelers, sending notices to past purchasers advising them of the dangers associated with the unstable machines, and offering free rider training to past and current purchasers of both three- and four-wheel vehicles are all positive steps.

The consent decree is not the final solution, nor does it address the totality of the issue. Some foreign manufacturers claim this settlement is just a moratorium on ATV's, as Congressman Florio indicated, and that nothing will really change. They reinforce the shortfalls of the decree. The settlement is seriously deficient because it leaves open the possibility that ATV makers may put three-wheelers back on the market with only minor design changes. The consent decree is also silent on requiring refunds to purchasers of ATV's who desire one.

ATV's were advertised and sold as a source of family fun and recreation for many years. Too often and for far too many families, the final destination of ATV "joy" rides are morgues and hospital emergency rooms.

Estimates indicate society has paid $1.6 billion, and that is billion, for medical and death costs due to these inherently dangerous machines. This figure does not include the terrible price many families pay due to the permanent maiming or loss of their loved ones. We can no longer afford this debt. Our children, who are ill-adept at assessing the risks involved, should not be allowed to die because they ride an inherently defective product.

The ban affects only future sales. It provides no incentive to remove the three-wheelers already in use. Refunds should be available to those consumers who bought their ATV as a toy but did not recognize it could be a death machine. If an adult knows the dangers and chooses to keep and ride their three-wheel ATV, fine. But, thousands of consumers were deceived by manufacturers' advertisements into believing they purchased a toy.

Consumers deserve a remedy, and I will work to provide them one. Industry has estimated the cost of refunds at $1 billion. I personally think the refund cost would be lower, between $175 million and $650 million. In any event, the cost is far less than the cost of fatalities and medical expenses caused by nonfatal accidents. Remember, over $1.6 billion has been spent on medical costs already as a consequence of ATV-related deaths and injuries. I will not even attempt to speculate on the financial costs of liability lawsuits involving ATV's.

I applaud the American manufacturer of ATV's, Polaris, for offering rebates during their settlement negotiations. I also applaud the States' attorneys general for their recommendations to seek further State and Federal legislation to address the continuing problem.

Mr. Chairman, you astutely noted only 90 people died before the Ford Pinto was removed from the market and just compensation paid to purchasers. Yet, many more deaths have been reported related to all-terrain vehicles. Between January 1982 and September 1987, there have been 883 ATV-related deaths. Over half of these victims were under 16. Approximately 271,000 serious injuries have been caused by ATV's. That's an average of 20 deaths per month and 7,000 injuries per month on the 2.3 million ATV's currently in use.

Many deaths and injuries go unreported. Most accidents occur in rural settings where hospitals are not hooked up to the National Emergency Injury Surveillance System (NEISS) to report the accident. Several children from my district are not included in the death statistics because they were brought to hospitals without NEISS.

In summary, Mr. Chairman, progress is finally being made to remove three-wheel ATV's from the marketplace. I am proud to have been a small part of that progress, and am dedicated to making even more progress. Guaranteeing past purchasers of three-wheel ATV's a refund, should they want one, is one progressive step I will be pushing, and I ask you and your committee's assistance in that effort.

[The prepared statement of Mr. Barton follows:]

TESTIMONY

OF THE

HONORABLE JOE BARTON (R-TEXAS,6TH)

MEMBER, SUBCOMMITTEE ON COMMERCE, CONSUMER PROTECTION & COMPETITIVENESS
FOR THE
HOUSE COMMITTEE ON ENERGY & COMMERCE

BEFORE THE

SUBCOMMITTEE ON COMMERCE, CONSUMER & MONETARY AFFAIRS
FOR THE
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

THURSDAY, JANUARY 28, 1988
9:30 A.M.
2154 RAYBURN HOUSE OFFICE BUILDING

SUPPORTING ALL-TERRAIN VEHICLE BAN AND REFUNDS

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JOE BARTON
6TH DISTRICT TEXAS

COMMITTEE ON
ENERGY AND COMMERCE

SUBCOMMITTEES:
ENERGY AND POWER
COMMERCE, CONSUMER PROTECTION
AND COMPETITIVENESS

1226 Longworth Building
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Congress of the United States
House of Representatives
Washington, DC 20515

December 21, 1987

Honorable Richard K. Willard
Assistant Attorney General
  of the United States
Civil Division
Department of Justice
Washington, D.C. 20530

Dear Sir:

I am writing to express my disappointment and opposition to portions of the proposed settlement worked out between the Consumer Product Safety Commission and the Justice Department regarding the future of all-terrain vehicles (ATVs).

I am a member of a subcommittee with jurisdiction in this area, and have been working on this problem for several years. The proposed settlement to ban the sale of ATVs but not to give owners the opportunity to a refund or exchange for a safer four wheel model, was made without consultation of the appropriate congressional leaders, and is not an agreement I can support. With Congress preparing for adjournment, I hope you will remain open to the possibility of a public comment and congressional participation in the coming months before the case is filed. Individuals and families who have suffered injury or death due to the faulty design of the ATV should be given the opportunity to comment on the conditions of an agreement of this magnitude.

My main concern is that the provisions in the proposed settlement will not adequately and absolutely prevent three wheel ATVs from killing and severely injuring individuals, especially children. As you know, ATVs were originally market targeted towards the teen and preteen population. Nearly half of all the 833 ATV victims since 1982 have been children under 16 years of age. One of these children was an 11 year old boy who lived in my district. To avoid more needless deaths as a result of the normal use of an ATV, aggressive action should be taken to rid our society of existing three wheel ATVs.

A written statement sent to current owners warning them of the imminent danger of three wheel ATVs is not adequate incentive to deter use of the vehicles. Manufacturers should be obliged to offer a voluntary refund or exchange program to current owners of three wheelers to insure significant reduction of their use. Honda, for example, has stated an eleven year old child can safely operate an ATV, and that they plan to continue to sell the 200 cc model. As long as manufacturers continue to make these statements, I feel any settlement regarding ATVs must contain compensation language.

I will be working with other concerned congressmen to ensure a compatible resolution to this issue is achieved. Please consider the views of the general public and Congress before any case with a settlement included is filed. I appreciate your immediate attention on this important matter.

Sincerely,

Joe Barton

Joe Barton, Member
Subcommittee on Commerce,
Consumer Protection and
Competitiveness

Mr. **Barnard**. Thank you very much. In the interest of time and I know Senator D'Amato has a close schedule, I am not going to ask any questions except one, and because I think the testimony pretty well explains all the questions that I had, but, Senator, I was interested in a letter that you wrote in December 1987 to the Chairman of the CPSC in which you said:

> I am most disturbed by the manner in which you and your general counsel secretly arrived at this settlement and presented it to the other commissioners with no opportunity for them to carefully consider it. Although the extensive settlement proposal had been in existence for several weeks and had been carefully reviewed by the industry, your counsel neglected to show it to the commissioners until the day of the Commission meeting. The commissioners were then told the proposal had to be given to the industry attorneys for their final review at a meeting scheduled the next day. Once again, you have abused the collegial process to achieve your goals at the expense of the consumers.

I think we will hear testimony later that Chairman Scanlon himself decided he did not want to be briefed on the settlement until the official meeting. Do you have any different opinions from what you have expressed in that letter?

Mr. D'**Amato**. Mr. Chairman, it smacks of the kind of conspiratorial action that really did take place. Can you imagine? A settlement of this import, one that the Commission had sought for more than a year, and one that had had extensive debates, and had apparently forced the Chairman to seek to release information with respect to what CPSC proposed to do? Certainly if he didn't release it, I don't know who did, but it surely came from the CPSC and it wasn't the two Commissioners who voted to take this enforcement action. To pressure them to accept this settlement plan at the one meeting, and of course, you create the obvious fear that if the Commissioners don't accept the settlement plan, then they will be accused of working adversely with respect to the interests of the consumer: To say we have this settlement plan and we have got to deal with it tomorrow, that speaks of the kind of motivation that I attributed to the Chairman and general counsel in my letter, the more I think about it and analyze it, because it was done to help railroad this settlement through without giving people the opportunity to fully assess the situation. The newspaper headlines, the long, detailed press releases that came out of both the Consumer Product Safety Commission and the Justice Department all proclaimed this "magnificent" settlement. I say it says nothing, because there are no refunds and no ban on three-wheeled vehicles.

Indeed, the manufacturers are boasting that don't worry, in several months we will be back out again selling three-wheeled ATV's, and then the height of it is what I call the manufacturers' liability protection release form. Mr. Chairman, the more I read this release form the more outrageous it becomes.

Let me ask the indulgence of my two colleagues here. The last part of this—by the way this is an agreement the customer has to sign and, of course, it says he has read it and he understands all of the above warnings and that failure to obey those warnings could result in death or severe bodily injury. You know that if an accident takes place what is going to happen next. This thing is going to go right into court and this form is going to be used against Johnny Jones, against the consumers of America and yet the Justice Department purports to say this is a wonderful thing. If you want to say these warnings are in the owner's manual, you should do these kinds of things, fine, that's another matter.

Listen to this, though. "Never drive an ATV without a good helmet and goggles." What is a good helmet? What about good goggles? And I should also wear—this is the customer signing this on behalf of his family and anyone else who uses that vehicle, "I should always wear boots." Imagine that? You really think the American children and consumers are going to wear boots. You are going to say you bought this, you agreed you are always going to wear boots. "Gloves?" Do you believe that? What an outrage!

I have to tell you something. You fellows, the law firms, you ought to charge the manufacturers a lot more money for getting the Federal Government to agree to something like this. It is incredible. "Heavy trousers." Imagine that, if you don't have heavy trousers. And "a long-sleeved shirt." During the summer you are supposed to wear a long-sleeved shirt as well? But if there are injuries and a child's arm is cut and scraped, you can say you should have worn long-sleeved shirts, and you should have worn your boots, your goggles, your helmet.

"Never drive an ATV at excessive speeds. Always be extremely careful when approaching hills, obstacles, and driving on unfamiliar or rough terrain." Anything that takes place, no matter what, the consumer will be blamed for it.

Mr. **Barnard**. Be at risk.

Mr. **D'Amato**. You will be at risk and have no recourse. The customer must sign this thing. "I have explained the foregoing warnings to the above-signed customer and I have provided the customer with a copy of this form. To the best of my knowledge I sold the customer an appropriate-sized vehicle."

It is really incredible that this is purported to be something that operates to the benefit of the American consumer. However, the CPSC and the Justice Department will say, "We have avoided costly litigation."

Is litigation costing about $3 million, costly as it relates to more than $1 billion a year worth of injuries and deaths, and children, tens of thousands of them being maimed? I will tell you this is a sellout.

It does not reflect well on the operations of Government and particularly the CPSC and the Justice Department, Mr. Chairman.

Mr. **Barnard**. I would like to interrupt the hearing just briefly this morning to introduce our colleague, Mr. Daub from Nebraska. Mr. Daub is catching a plane, but he has a witness here today from his district and I would like for him to offer the introduction at this time, although we will be introducing him later.

Mr. **Daub**. Mr. Chairman, I am very pleased to be before my old committee. I sure enjoyed my service on the Government Operations Committee and it is nice of you to allow me this very brief 60 seconds. And if the Senator is going to stick around, I am certainly not going to be too long.

Let me say to you, Mr. Chairman, to my colleagues who took the time to be at this very important hearing, that had my plane schedule been a little different, I would have been here personally to sit beside and introduce to you, Jim and Deborah McFadden, who reside in Nebraska's Second Congressional District, which I represent.

Jim McFadden's testimony before the subcommittee is a tragic one. It involves the death of their oldest son and a person riding a three-wheeled all-terrain vehicle on a public ski slope. The McFaddens are courageous to appear in the public eye of Congress and the media in a time of public grief. I am personally impressed with their faith and with their strength of character.

I want to thank the chairman and committee members for hearing Jim's testimony which presents a different perspective on ATV's. The public safety perspective.

His testimony is important because it gives lawmakers a handle on ways to prevent such a tragedy from occurring again. We need to ask how the Federal Government can be responsive and responsible in the case of ATV's, which are used by persons engaged in both public and private activities.

I am hopeful that the hearing today will be informative and constructive. There are many questions that need to be answered as Congress pursues a proper course of action and after having spent considerable time with these two very fine and courageous citizens, I believe if the committee will take time to question them, they will offer constructive information for the record that will be useful for others as well as this committee in formulating your course of action.

I thank you very much for this opportunity to introduce in advance this very important testimony which you will hear a little later this morning.

Mr. Barnard. Thank you very much, and welcome to the hearing.

Mr. Craig.

Mr. Craig. Thank you, Mr. Chairman. Let me again express my appreciation to Chairman Florio and to my colleague, Congressman Barton from Texas for their testimony. We do differ in our opinions as to how one approaches an issue like this, and I think that it is obviously very clear and it has been made clear over the past several months and years.

I think, Mr. Chairman, the thing that interests me most—and I will have to say I am sorry that Senator D'Amato is gone. I will, therefore, be cautious in my comments because he is not here to respond, and it wouldn't be fair. I would have to say he is very good in putting the flair to the statement that needs to have some justification brought to it.

Fifty-four deaths in the State of New York, 18 of them as a result of being drunk on a vehicle. Eighteen deaths is the figure that we ought to understand. That ought to be for the record.

Sixteen of the 54 deaths because they broke the law while riding them. That also ought to be for the record. It is now for the record.

Somehow this committee and everybody who wishes to run with flying banners on this issue failed to recognize that people violate the law, and when they do, they die. We can't micromanage safety in that regard.

Eighty percent of the auto accidents that resulted in death in my State last year was because somebody was drunk behind the wheel, and we have got laws against that. Thirty percent of those who died as a result of ATV accidents are drunk behind the handlebars.

Somehow we like to ironically cast that off because this vehicle is such a terrible machine.

That is reality. Come on, folks, look at the facts. Yes, we have some problems. Yes, we ought to tighten down on safety. We ought to be damn hard, and we are getting there. But nobody can replace the responsibility of the parent for the child and parents ought to bear that burden. Nor can we say that when somebody who is driving drunk, we are going to take cars off the road, Mr. Chairman.

Maybe we should. Now, if we are going to, maybe we first should drug test those who drive public conveyances in which they have the responsibility of someone else's life. Those are the realities, these are the facts. Yes, we have a problem here and we are dealing with it, but let's make sure the total picture is in view and that all is on the record, because there is more than just one side to this. And I will say that it makes for great politics when one only dwells with the one side.

I guess that is the point that needs to be made here, especially as it relates to one of the witnesses today, who seemed to choose one avenue over the other.

I will have to say to the gentleman before us now they have been most fair and balanced in their approach and I appreciate it.

Thank you, Mr. Chairman.

Mr. **Barnard**. Gentlemen, we thank both of you for the time that you have given this hearing this morning. We thank you for your testimony, and I realize you have a very, very busy schedule. Mr. Inhofe.

Mr. **Inhofe**. No. questions Mr. Chairman.

Mr. **Barnard**. With that, we thank you again and you are excused.

Mr. **Barton**. Can I make a very brief comment on Congressman Craig's remark because he and I have discussed this issue many times and I want to say I agree with everything he said. I would add the caveat that in addition to the accidents that are caused by misuse of the vehicles and drivers being intoxicated and all of those things, which a high percentage are, there are also a significant percentage of injuries and deaths caused when these factors are not involved. And these vehicles are inherently unstable, which causes them to be inherently unsafe.

There are some proposed safety standards that the Consumer Product Safety Commission is in the process of releasing. I have had an opportunity to review these standards and it is my understanding that not one three-wheel ATV vehicle currently on the market today meets them.

Now, we need to remember that, when we discuss some of the statistics Congressman Craig so correctly put into the record.

Mr. **Craig**. Mr. Chairman, my colleague from Texas, let me thank you for that comment. You are right. It is a unique machine. I do have a question for you and I think it is an important one because it is something that seems to have escaped the whole discussion on all sides of this issue.

At what age in the State of Texas can you be legally licensed to ride a two-wheel motorcycle on the public roads of the State of Texas?

Mr. **Barton**. In Texas, I believe you have to be 16.

Mr. **Craig**. In Texas, what is the licensure requirement on age to ride an ATV?

Mr. **Barton**. There is no requirement.

Mr. **Craig**. Important point. That is something we missed along the way.

Mr. **Barton**. Something we need to do.

Mr. **Craig**. They walked away from that. I have encouraged my legislature in the last 2 years in Idaho to move towards licensure. We won't let kids drive cars on the road until they go through driver training or until they are much older, if they haven't gone through that. Somehow we think that we can allow a child to operate a motorized vehicle, a three-wheeler in this instance, on the public roads, although we say don't ride it on the public roads. When mom and dad's heads are turned they will do as they please, and that is why licensure is a very important thing that nobody seems to have addressed.

It is a State responsibility, and I am interested that we like to cast the blame in one rather categorized area instead of saying, there is somebody else here who has a responsibility for safety, and I believe that is true with licensing for States.

Many States are moving in this direction, thank goodness, and you know, I am encouraging my State and I would think that all legislators, including Senator D'Amato, as well, to say to his State legislature in Albany, NY, license ATV's, keep the little kids off of them.

Mr. **Barton**. The State attorneys general made that recommendation in their report, and I support that, both at the State level and at the local level within city limits. I would point out that even when we go to licensing of ATV's for minors, you still have the problem of use on private property and there is some debate about whether even a State or local license requirement would be effective if riders literally go on their own property.

Mr. **Craig**. Your point is well taken. I know that it is key. When a parent makes a decision as it relates to purchasing for their child or their young person, a motorized vehicle, if they can't license their children, if children are not old enough to license, in most instances parents will not buy ATV's or own them for that simple reason. Parents will not want to be liable out on the roads with ATV's or have their child in violation of State law.

So, it is a deterrent. Not absolute, but a very valuable one that somehow has gone ignored.

Mr. **Barnard**. Thank you, gentlemen.

Mr. **Inhofe**. I would like to make a comment on that. Following up just for a moment on this, but before you leave, I think Congressman Craig brought up something that I have some notions about. I talked to him about this. I don't know but most people, I believe, in Congress served at one time in the State legislature. I did 22 years ago, and I can recall probably not a 2-week period going by during the many years I served in both houses of the Oklahoma Legislature when issues like this came up that should have been addressed at local levels and should have been addressed by the State legislature and yet were controversial and they felt if they don't do anything with this hot potato, it will end up in Congress and they will do it. I think I commented at a previous committee meeting, Mr. Chairman, along these same lines.

I believe this is something—our States are different. Congressman Florio, your State is different than Oklahoma and even Texas and Oklahoma are different in many ways.

I feel very strongly that this is something they have been derelict at the State level in addressing.

They should have done it a long time ago or we probably wouldn't be addressing this today.

Mr. **Barnard**. Thank you very much.

[Correspondence between Chairman Scanlon and Senator D'Amato follows:]

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J. KEITH KENNEDY, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025

December 19, 1987

The Honorable Terrence Scanlon
Chairman
United States Consumer Product Safety Commission
5401 Westbard Avenue
Bethesda, Maryland 20207

Dear Chairman Scanlon:

After having been informed by the Department of Justice this week that they are prepared to immediately file an imminent hazard complaint against the All-Terrain Vehicle (ATV) industry, I was appalled to learn that the Consumer Product Safety Commission, at the urging of your General Counsel, James Lacy, has hastily decided to accept a settlement advanced by the Japanese ATV manufacturers.

This settlement is very good for the industry, but a disaster for the American public. It is yet another sad example of how the CPSC, through your machinations, has failed to carry out its statutory mandate. I have urged the Justice Department to reject this proposal and file the complaint immediately.

The proposed settlement approved by the Commission on December 16, 1987 falls far short of what the Justice Department has agreed to seek in court, and is inconsistent with the Commission's December 12, 1986 vote. By dropping all provisions for consumer refunds, the agreement contains no meaningful way of getting children off adult-sized ATVs. Although this omission is consistent with your vote last December not to pursue the case, it means that the proposed settlement provides far less than what the only major American manufacturer has offered.

The major beneficiary of this settlement will be the Japanese ATV industry, whose members will attempt to use it to reduce their products liability problems. The settlement contains an unconscionable safety verification form that will serve the ATV industry as evidence of a consumer "release" from liability or "consent" to certain risks of which the consumer has not been adequately informed.

I was most disturbed by the manner in which you and your General Counsel secretly arrived at this settlement, and presented it to the other Commissioners with no opportunity for them to carefully examine or consider it. Although the extensive settlement proposal had apparently been in existence for several weeks, and had apparently already been carefully reviewed by the industry, your General Counsel neglected to show the proposal to the Commissioners until the day of the Commission meeting. The Commissioners were then told that the proposal had to be given to the industry attorneys for their final review at a meeting scheduled the next day. Once again you have abused the collegial process to achieve your goals at the expense of American consumers.

You can be assured that this matter, and your actions, will be subject to a thorough investigation by the appropriate Congressional oversight Committees.

Sincerely,

Alfonse M. D'Amato
United States Senator

cc: A. B. Culvahouse, The White House
Arnold Burns, Department of Justice
Commissioner Dawson, CPSC
Commissioner Graham, CPSC

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

December 29, 1987

The Chairman

The Honorable Alfonse M. D'Amato
United States Senate
Washington, D. C. 20510

Dear Senator D'Amato:

This is to acknowledge and take issue with your December 19, 1987 letter concerning the status and handling of the Consumer Product Safety Commission's enforcement action against all-terrain vehicles (ATVs).

First, with regard to timing, it should be noted that both the Commission and the Department of Justice (DOJ) long ago assigned teams of attorneys to the ATV enforcement matter. Those teams have been working together closely for months, belying the assertion that the Commission "has hastily decided to accept a settlement advanced by the Japanese ATV industry."

Second, as to the substance, let me summarize by saying that my colleagues and I have tried to obtain for the American public the most effective possible action in the shortest amount of time. Lengthy litigation can be costly and the results uncertain. In this case negotiation and settlement yielded strong, immediate consumer benefits. Furthermore, as with most legal cases, this one had certain weaknesses. Without detailing them here, suffice it to say that the unanimous Commission decision of December 16, 1987 to negotiate was based on a legal assessment of the potential strengths and weaknesses of the case by our lawyers and those of our counsel, the DOJ. Also, the Commission was not oblivious to Section 13 of S.1882, dealing with the subject of negotiations, which was unanimously approved by the Senate Commerce Committee on November 19, 1987. Nor could it fail to take into account a November 20, 1987 letter from the Chairman of the Consumer Subcommittee of that Committee, which in part reads:

> "I encourage you to schedule within the next few days a meeting between the Commission and the distributors of ATVs in order to discuss the possibility of action [on a possible settlement] regarding those vehicles."

Following receipt of that letter, the Commission unanimously voted on November 24, 1987 to ask the industry to submit its best offer. I am informed by our General Counsel that the industry responded on December 3, prompting the attorneys to meet several days later and the ATV manufacturers to submit supplemental written offers on December 10, 1987. On December 11, 1987, the DOJ notified the Commission of its willingness to file suit, and from that point took the lead in settlement discussions with the industry.

As for your statement that the Commission's General Counsel and I "secretly arrived at this settlement, and presented it to the other Commissioners with no opportunity for them to carefully examine or consider it," permit me to make several observations. First, let me categorically state that I took no part in the negotiations or in the development of settlement offers. To the contrary, I advised our attorneys that "I do not wish to be briefed, nor do I want my staff briefed, on the progress of the ATV negotiations except at formal Commission meetings." (See enclosed November 30, 1987 memo.) As a consequence, I very much doubt I was in the possession of relevant information before it was made available to my Commissioner colleagues. Nor do I believe that they had insufficient time to evaluate the information that was provided them. Our General Counsel assures me that Commissioner Graham received three briefings prior to the formal December 16 briefing, that she was promptly given copies of all industry submissions, and that Commissioner Dawson's staff was briefed prior to the December 16 meeting. In addition, I might point out that this four-hour meeting culminated in another unanimous Commission vote.

Contrary to your estimation that a "settlement proposal had apparently been in existence for several weeks, and had apparently already been carefully reviewed by the industry...," I am also informed by our General Counsel that both the proposed complaint and the draft preliminary consent decree were prepared by DOJ, not CPSC, attorneys and were completed only days before the December 16, 1987 briefing. Also, I am told it was the DOJ, not the CPSC, that shared the complaint and the proposed preliminary consent decree with the industry, in accordance with its customary practice. The DOJ's rationale, as I am informed by our General Counsel, was as follows: by providing the prospective defendants with a copy of the complaint just prior to filing, the individual or entity may be encouraged to settle the matter in a way that is advantageous to the government and the consumer. Moreover, I have been assured that industry's advance knowledge of the complaint did not prejudice our case in any way.

In sum, Senator, I believe my actions, and those of the Commission over the past six weeks, are entirely appropriate, consistent with the unanimous advice of our attorneys, both at the DOJ and here, and in line with the recommendations of one of our substantive oversight committees.

Sincerely,

Terrence Scanlon

Terrence Scanlon
Chairman

Enclosure

cc: Mr. A.B. Culvahouse
Counsel to the President
The White House

Mr. Arnold I. Burns
Deputy Attorney General
Department of Justice

Commissioners Carol Dawson and Anne Graham

UNITED STATES GOVERNMENT
Memorandum

U.S. CONSUMER PRODUCT
SAFETY COMMISSION
OFFICE of the CHAIRMAN
WASHINGTON, D.C. 20207

November 30, 1987

TO: James V. Lacy
General Counsel

FROM: Terrence Scanlon
Chairman

RE: ATV Negotiations

Because of the importance and sensitivity of the upcoming ATV negotiations and in order to insure optimal communication between your office and the Commission, I suggest that all briefings and reports between your office and the Commission take place at formal Commission meetings attended, as usual, only by those with a need to know. Since we will likely be called to give the Congress a full accounting of the negotiations, it is my further suggestion that all discussions between your office and the Commission be on the record. If necessary, formal Commission meetings can be scheduled weekly for this purpose.

I do not wish to be briefed, nor do I want my staff briefed, on the progress of the ATV negotiations except at formal Commission meetings. Specifically, this issue should not be discussed at our daily staff meetings.

You may wish to discuss with my colleagues their desires regarding informal reports from your office about ATV negotiations.

cc: Vice Chairman Carol Dawson
Commissioner Anne Graham
Leonard DeFiore, Executive Director

Mr **Barnard**. Let me add before the next witness comes on, I am restraining myself with all the strength of my capacity not to enter into this debate. Because I feel like I am conducting a hearing, Mr. Craig, and Mr. Inhofe, but there are a lot of aspects of what you say, if a State is not going to do it, is that any reason for the Federal Government not to do it? When you have got a vehicle such as this, which you sold in interstate commerce, what do we have the Consumer Product Safety Commission for if they are not supposed to be responsible for things such as this?

And as I said, I don't want to debate the issue, but——

Mr. **Craig**. There is no debate here. We are talking about licensure. The Federal Government has not licensed cars. That is a State responsibility.

Mr. **Barnard**. We are not intending to.

Mr. **Craig**. What I am saying is that interestingly enough, we are looking at a vehicle in which there has been a failure to license that has caused a lot of young people to ride ATV's that otherwise would not have been.

Mr. **Barnard**. Otherwise, we blame it completely on the States, that is a copout and we are not taking the responsibility. We have a responsibility.

Mr. **Craig**. Mr. Chairman, I am only saying it is legitimate to add it as part of the total debate.

Mr. **Barnard**. I don't disagree with that. We will hear from the attorneys general as to what they think about this.

Mr. **Barnard**. Our next witness is a former colleague of ours, a very distinguished young man who had distinguished himself while he was here in the Congress, and now, and I have a lot more confidence in the State of Massachusetts now that he has been elected the attorney general; and Jim, we are delighted to have you with us this morning, and we welcome you to this hearing.

We would also have had Attorney General Robert Abrams of New York. Unfortunately, he was appointed special prosecutor by the Governor last night in a litigation in New York and will not be able to be here.

Well, without objection, we will include his testimony in the record.

[Mr. Abrams' prepared statement and attachments follow:]

TESTIMONY OF NEW YORK STATE
ATTORNEY GENERAL ROBERT ABRAMS

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT OPERATIONS
COMMERCE, CONSUMER, AND MONETARY AFFAIRS
SUBCOMMITTEE
WASHINGTON, D.C.
JANUARY 28, 1988

Testimony of Attorney General Robert Abrams
House of Representatives
Committee on Government Operations
Subcommittee on Commerce, Consumer and Monetary Affairs
Washington, DC
January 28, 1988

Chairman Barnard and members of the Committee; thank you for this opportunity to address the serious ongoing safety and consumer protection issues posed by the all-terrain vehicle industry.

In particular, I welcome the opportunity to discuss the U.S. Consumer Product Safety Commission's proposed settlement with the industry.

Before I explain my specific objections to the proposed settlement, let me briefly describe what is at stake. All-terrain vehicles have left a legacy of accidental deaths and injuries which is staggering to contemplate. There have been over 900 deaths and 330,000 injuries from accidents involving ATVs since 1982. Almost half of those killed and injured have been children under 16 years of age. There have been 59 deaths in my own state of New York alone.

No other comparable vehicle -- such as snowmobiles, mopeds or minibikes -- has an injury rate anywhere near the rate for ATVs. The Ford Pinto, widely regarded as a major consumer safety nightmare, caused 61 deaths before it was recalled.

Why have there been so many ATV accidents? The design of the vehicle and the industry's false and deceptive marketing practices are the fundamental causes.

The ATV is a unique and complex vehicle. Operating an ATV is physically demanding and conceptually confusing. To execute a simple turn, the rider must turn the handlebars one way and lean the other way towards the outside of the turn, in order to reduce the weight on the inside rear wheel. Failure to successfully execute this maneuver can result in crashing into objects or turning the vehicle over.

Relatively minor errors in operating an ATV can lead to serious injury or death. Its high center of gravity and balloon style tires combine to make it very prone to tipping over at the slightest bump or irregularity in the terrain. It is difficult for the rider to throw himself or herself free from the vehicle when it does tip over. The ATV often lands on the rider in an accident, increasing the chances of serious injury.

Given these characteristics and the fact that ATVs can travel at speeds of up to fifty miles per hour, it is apparent that the risks of harm are greatly magnified when these vehicles are operated by children under the age of 16.

While the CPSC has readily acknowledged these dangerous features of the ATV's design in its complaint, the remedies it proposes are not sufficient.

The dangers of ATVs have been compounded by the industry's pattern of false and deceptive advertising. ATVs are represented to the public as safe, family fun, almost as if they were a big toy, a sort of oversized tricycle. Industry advertising routinely shows the most dangerous maneuvers -- wheelies, jumps, high speed operation, climbing steep slopes -- as if anyone could do them simply and without fear. The fact that these vehicles are inherently dangerous and difficult to operate, even for the most skilled driver, has not been disclosed by the industry to potential customers.

The CPSC has been slow to take meaningful and effective action against this product, despite the public outcry and well-documented Congressional hearings on this issue over the past two years. In July, 1986, Congress found that ATVs presented an imminent hazard to the public and urged the Commission to use its emergency authority to ban ATVs intended for use by children and to recall all 3-wheeled ATVs. The Commission did not do so. Now that CPSC is finally moving towards a settlement, its proposed terms are woefully inadequate. We must insure that any final settlement reached by CPSC fully protects consumers and holds industry accountable.

At a minimum, the final settlement should include the following features:

1) 3-wheeled ATVs must be banned outright:

There is virtually unanimous expert opinion that 3-wheeled ATVs are not, and cannot be made, safe. Yet, CPSC's preliminary Consent Decree with the industry would only take new ATVs from the market, and it leaves open the possibility of resumed sales of a redesigned 3-wheeled model at some future date. Moreover, current dealer inventories could continue to be sold. This is unacceptable.

2) Distribution and sale of ATVs of any configuration to children under 16 years of age must be prohibited.

The preliminary settlement allows ATVs to be sold to children as young as 12 years old. Yet experts agree that children under 16 years of age lack the physical abilities and the judgment to safely operate these vehicles. A representative of Honda actually attempted to absolve his firm of responsibility by telling a meeting of 29 State Attorneys General last November that teenagers are by nature reckless, and that if they were not using ATVs they would be out engaging in some other reckless activity. This chilling logic is yet another indication of the industry's unwillingness to act responsibly in its marketing of these dangerous products.

3. All consumers who purchased any ATV should be entitled to a refund from the industry:

The CPSC's preliminary decree allows only refunds for dealers, not for consumers. Most consumers bought these vehicles because the industry represented them as safe, simple, and fun. A fully informed public will have little use for these vehicles, and the CPSC should use its specific, unique powers to seek consumer refunds. This is not only fair play for consumers, it would also enhance public safety by providing incentives to withdraw more of these dangerous vehicles from use.

There are many other flaws in the CPSC preliminary decree which I cannot go into in the time available now. I would refer the Members of the Committee to the preliminary Report and Recommendations of the ATV Task Force of the National Association of Attorneys General for further details. Among these issues are the need for free training at industry expense for all ATV owners; the need to insure that the industry cannot use the Consumer Safety Verification Form as a shield against liability lawsuits; and the need to fully disclose the fact that ATVs pose a constant danger of death or injury to even the most experienced operators. Finally, adequate performance standards for ATVs must be developed and adopted without delay.

The states are not going to wait to protect our citizens. In New York, I will introduce a bill into the legislature banning the sale and use of 3-wheeled ATVs, prohibiting the use of any ATVs on public land, and restricting the sale and use of 4-wheeled ATVs to people over 16 years of age. I will also seek to strengthen existing New York ATV laws to provide, among other things, for hands-on training of all ATV riders, speed restrictions, and required protective gear.

Ultimately, the states cannot do it alone. ATVs are a national hazard, requiring national action.

I appeal to this Committee to send a message to the U.S. Consumer Product Safety Commission and the ATV industry that we can wait no longer for comprehensive, effective action to protect our citizens and our children from these dangerous vehicles.

REPORT AND

RECOMMENDATIONS

OF THE NAAG

ATV TASK FORCE

EXECUTIVE SUMMARY

In December, 1987, the National Association of Attorneys General (NAAG) created a Task Force to study the hazards of all terrain vehicle (ATV) use and to recommend a course of action to the Attorneys General. This report summarizes the work of the Task Force to date, and recommends actions to be taken in the immediate future.

In short, the Task Force has found that ATVs are imminently and unreasonably hazardous. The Task Force has also concluded that steps taken thus far by the federal government are inadequate, and that further action is needed.

The report covers the the following areas:

1. Ban on three-wheel ATVs;
2. Ban on current promotion and sale of ATVs for use by children;
3. Recall and refunds to consumers who have bought ATVs;
4. The need for meaningful performance standards;
5. Restrictions on ATV advertising;
6. Adequate warnings to potential riders of the hazards of ATVs;
7. The safety verification form proposed by the Consumer Product Safety Commission (CPSC);
8. State legislative initiatives;
9. Federal legislative initiatives.

This report is not all-inclusive. Silence on any particular issue does not necessarily mean that it is not of concern to the Task Force.

INTRODUCTION

On December 29, 1987, Missouri Attorney General William L. Webster, Chair of the NAAG Consumer Protection Committee, appointed this Task Force to study ATVs and the hazards posed by them and to recommend a course of action to the Attorneys General. Tennessee Attorney General W. J. Michael Cody is chair of the Task Force. The other Task Force members are:

California Attorney General
John Van de Kamp

Connecticut Attorney General
Joseph I. Lieberman

Illinois Attorney General
Neil F.Hartigan

Massachusetts Attorney General
James M. Shannon

Michigan Attorney General
Frank J. Kelley

Minnesota Attorney General
Hubert H. Humphrey III

Missouri Attorney General
William L. Webster

New York Attorney General
Robert Abrams

Texas Attorney General
Jim Mattox

Wisconsin Attorney General
Don J. Hanaway

Under our federal system of government, the Consumer Product Safety Commission (CPSC) has primary responsibility to protect the citizens of all states from dangerous and hazardous products. The Task Force believes that the CPSC has not fully met its obligation in the case of ATVs. While the CPSC complaint against the industry acknowledges that ATVs are imminently and unreasonably hazardous, the Preliminary Consent Decree of December 30, 1987 (Decree) has several deficiencies which, if left uncorrected, will result in death and injury which could otherwise be prevented.

The Task Force has been unable to discover any other hazardous consumer product sold which has been responsible for more deaths and injuries. In the past five years alone, over 900 people have died, and 330,000 people have been injured in ATV-related accidents. Nearly half of those killed and injured have been children. Stronger action than is proposed in the Decree has been taken by the federal government following far fewer deaths associated with the use of other consumer products.

Although the CPSC has the primary duty for insuring the safety of consumer products, Attorneys General must also act when their citizens are victimized. As the chief legal officers of the states, the Attorneys General have the responsibility of enforcing state consumer protection laws.

This Task Force has studied the ATV issue in depth. The recommendations made in this report present our views on how effective action might be taken at the federal and state levels. Our chief concerns center on the importance of: 1) permanently banning three-wheeled and child-sized ATVs; 2) prohibiting the use of ATVs by children under 16 years of age; 3) instituting a consumer refund program for all ATVs; and 4) developing performance standards. We urge your immediate consideration of the recommendations that follow.

1. BAN ON THREE-WHEELED ATVs

The Task Force finds that current three-wheeled ATVs have design defects which render them imminently and unreasonably hazardous consumer products. Accordingly, the Task Force recommends an immediate ban on the sale of all three-wheeled ATVs.

ATV design defects include lack of an adequate suspension system, lack of an effective rear-wheel differential suitable for variable terrain, a high center of gravity in relation to the dimensions of the vehicle, and tires which contribute to machine tipping. This combination of faulty design characteristics produces steering and balance problems which cause ATV riders to lose control of the vehicle.

The most significant handling and control problems occur in turns and on slopes. In turning an ATV, the rider must shift his or her body weight to the outside of the turn, while at the same time leaning into the turn. In moving up a slope, the rider must keep his or her body weight forward over the ATV. During either a turn or a climb, a slight change in terrain, including a bump or a hole, can cause the ATV to flip over or roll over before the rider has an opportunity to respond and regain control.

These ATV control problems are most acute for untrained and inexperienced riders. However, even experienced riders can lose control of the three-wheeler in turns or uphill climbs, or when encountering changes in terrain. In sum, no amount of training and experience can protect the rider from the inherent dangers involved in operating a three-wheeled ATV.

The safety problems are compounded by the fact that three-wheeled ATVs have been promoted as solid, stable and easy-to-operate vehicles. The three-wheeled configuration and the large tires create the illusion of stability, and provide no hint of the difficult and complex reactions required to control the ATV.

The Preliminary Consent Decree

The Decree provides that the manufacturers shall halt the marketing of all three-wheeled ATVs, and the distribution and sale of three-wheeled ATVs to retail dealers. In addition, the manufacturers agree to offer to repurchase only *new* three-wheeled ATVs from the inventory of retail dealers. The Stop-Sale and Repurchase provisions expire if a final consent decree is not entered within forty-five days of the entry of the preliminary consent decree. Should a final decree be entered, any future distribution and sales of three-wheelers by the ATV manufacturers may be permitted to the extent such three-wheelers meet future standards acceptable to the CPSC.

The requirement that the ATV manufacturers offer to repurchase new three-wheelers from dealers is not binding on the dealers, since they are not bound by or named in the lawsuit. The Decree does not prohibit distributors and dealers from selling their remaining *new or used* inventories of three-wheelers to the public. Nor does the Decree require the manufacturers to repurchase three-wheelers from consumers. The issue of consumer refunds is discussed in more detail below.

Recommendations

The Task Force supports the provision in the Decree which prohibits the ATV manufacturers from marketing, selling or distributing current three-wheelers. However, the Task Force concludes that additional action is required to eliminate the problem of three-wheelers. In particular, the Task Force recommends that retail dealers be required to sell their current new and used three-wheel inventories back to the manufacturers and be prevented from making any further sales of all three-wheeled ATVs to the public.

2. PROMOTION AND SALE OF ATV FOR USE BY CHILDREN

The Task Force concludes that children are not able adequately to handle ATVs. Therefore, adult-sized three or four-wheeled ATVs should not be sold for use by children under 16 and child-sized ATVs should be banned entirely.

The CPSC Complaint

The Complaint alleges that, each day, millions of individuals, a large number of them children under the age of 16, are unwittingly exposed to the risk that, as a result of their operation of ATVs, they will be involved in an accident in which they will either die or suffer a severe personal injury such as quadriplegia, paraplegia, a ruptured organ, or a skull or bone fracture. The Complaint further alleges that the risk of harm presented by ATVs is substantially magnified when they are operated by children under 16. We agree.

The Complaint correctly recognizes that ATVs are unique, complex, and dynamically unstable vehicles, requiring quick perception, decision and reaction times, and precise rider manipulation which is neither instinctive nor easily mastered by a person of ordinary skill. There is virtually no margin for error in the operation of ATVs because of their peculiar operating characteristics. The penalty for making the smallest miscalculation may be death or catastrophic injury.

The Decree Is Not Adequate

Although the Complaint clearly recognizes the dangers of ATVs to youthful operators, the Decree fails to deal with this issue. The Decree requires the defendants to represent that ATVs with engine sizes of 70 cubic centimeter displacement (ccd) up to 90 ccd should not be used by children under 12, and ATVs with engine sizes of greater than 90 ccd should not be used by children under 16. These provisions do not adequately address the problem. According to the Decree, children under 12 are permitted to ride an ATV. The Decree reserves CPSC's right to proceed separately under the Federal Hazardous Substances Act against ATVs which are marketed for children under the age of 12. The Task Force believes that any negotiated settlement should deal directly with the problem as acknowledged in the Complaint.

Greater Risk To Children

Children under 16 who operate ATVs are at an even greater risk of injury and death than adults. They do not have the judgment, constant attentiveness, and high degree of skill to integrate the ATV with varying environments. They also lack the counter-intuitive skills necessary to make split-second decisions that could mean the difference between life and death. Typically, children under the age of 16 lack the cognitive abilities, physical size and strength, motor skills, experience and perception to operate an ATV safely. All of this, combined with a tendency toward higher risk-taking attitudes than most adults and an assumption of a posture of exaggerated independence, inhibits children under 16 from recognizing and operating ATVs within their skill levels.

Nearly half of the ATV-related fatalities are children under 16 year old. Twenty percent are under 12 years old. More than half of the injury victims are children under 16 years old. Since 1982, approximately 400 ATV-related deaths and over 150,000 hospital emergency-room-treated injuries involved children under 16.

Children under 16 can not operate cars in most states, and there is no reason they should be operating ATVs. ATVs are not toys. They are vehicles that in inexperienced and immature hands produce death and catastrophic injury.

3. RECALL AND CONSUMER REFUNDS

All persons should be entitled to return ATVs to the manufacturers for refunds. Refunds should be available for any three or four-wheeled ATV and not be limited to ATVs which are banned.

Basis for refunds

Consumer refunds are warranted for a number of reasons. Manufacturers failed to disclose the hazards of ATVs and, in fact, affirmatively misrepresented the characteristics of ATVs. For example, ATVs were marketed as recreational vehicles for young children. In fact, ATVs pose a particular hazard to children under 16 who account for nearly half the ATV-related deaths. Advertisements show maneuvers of ATVs, such as jumps and riding at high speeds on rough terrains. In fact, such maneuvers are inherently dangerous and beyond the ordinary skills of most riders.

Consumer refunds should be provided because they are an incentive to remove ATVs from use. With fewer ATVs in use, the number of deaths and injuries will be reduced.

In addition, consumers who have already purchased an ATV had no notice or inadequate notice of the risk of death and severe injury posed by ATVs. Had they known, many consumers may not have bought them. Once they learn of the dangers, many consumers are probably not likely to use them. Their resale value may well be, and should well be, minimal. The consumer should be allowed to recoup undeserved losses of this kind.

Furthermore, manufacturers have profited by their unfair and deceptive practices in marketing ATVs. They should not be permitted to retain profits obtained from a deceived public, and obtained from the sale of inherently dangerous products.

Past recall programs

Recent recalls for repair or refund of consumer products have been instituted on the basis of far fewer than the 900 deaths and 330,000 injuries related to ATVs. Examples are noted in the 40th Report by the Committee on Government Operations, July 16, 1986, (House Report 99-678) on ATV use. In 1978, the Ford Pinto was recalled after 61 deaths, following a determination by the National Highway Traffic Safety Administration that the vehicle was unsafe because the fuel tank could explode when hit from the rear. About 1.4 million Pintos had been marketed.

In 1977, CPSC declared a ban and recall of TRIS-treated apparel and fabric for children's sleepware. TRIS, a chemical fire-retardant, had been linked as, though not conclusively proven to be, carcinogenic and mutagenic to humans.

In 1980, Proctor & Gamble Company voluntarily withdrew its Rely brand tampons. The Center for Disease Control had reported that a study of 50 women showed an association between usage of the tampon and toxic shock syndrome (TSS), a life-threatening illness. Twenty-five deaths since 1975 had been attributed to TSS.

Authority for recall and refund

Under the Consumer Product Safety Act (CPSA), the CPSC has the direct authority to obtain refunds of the purchase price of a product. The CPSC lawsuit is brought pursuant to Section 12 of the CPSA on the grounds that ATVs are an "imminently hazardous consumer product" — one which "presents imminent and unreasonable risk of death, serious illness, or severe personal injury." In such a case, CPSC may seek, among other things, an order of a refund for a product. In its complaint, CPSC did seek a consumer refund for all three-wheeled ATVs and all adult-sized four-wheeled ATVs purchased for use by children under 16 years of age.

However, there is no consumer refund provision in the federal settlement. The settlement entitles only dealers to sell-back new three-wheeled ATVs to the manufacturers.

Obviously, consumers should also be entitled to a refund for three-wheeled ATVs. Furthermore, consumers also bought four-wheeled ATVs under false representations and without notice of the hazards. Therefore, consumers should be entitled to refunds for four-wheeled ATVs as well as three-wheeled ATVs.

4. PERFORMANCE STANDARDS

A mandatory consumer product safety standard consisting of performance requirements for ATVs must be developed. The performance standard must be one which results in changes in design of currently or previously manufactured ATVs and must address the following vehicle characteristics:

- lateral stability
- longitudinal stability
- transient performance
- braking performance
- suspension performance
- speed capability

The Task Forces concludes that an ATV mandatory performance standard should be developed and implemented within one year.

Analysis of Decree

The Decree includes a declaration that the CPSC has already commenced its rulemaking process for the establishment of a mandatory standard. It also provides that the ATV industry defendants attempt, in good faith, to negotiate an agreement on voluntary standards within four months of the court's approval of a final decree. The Decree then specifically permits the reintroduction of three-wheeled ATVs in the event that those vehicles meet either the mandatory or voluntary standard, whichever is adopted.

The Task Force notes two major problems with the Decree's provision on standards. First, the Decree refers only to "standards" and not to standards respecting performance requirements. Based on the CPSA's definition of a standard, the requirement of this provision could be satisfied if the CPSC adopts a safety standard which requires ATVs to be marked with or accompanied by certain warnings or instruction, but does not include performance requirements. 15 U.S.C. §2056(a). Second, the settlement does not specifically declare that a mandatory standard (performance or other) will be promulgated by the CPSC if the parties fail to reach agreement on a voluntary standard four months from the date of the final decree. Thus,it appears that if the parties do not reach agreement, there may possibly be no adoption of any standard by the CPSC, notwithstanding the fact that it may have commenced the rulemaking process.

Recommendation For Action On a Performance Standard

Because the states may be bound to accept any performance standard promulgated by the federal government, the Task Force believes that it is critical for the states to participate in the development of that standard.

The CPSC has already started work on an ATV performance standard. It has met and corresponded with representatives from the ATV industry. Under the Decree, the CPSC is required to furnish the industry defendants with a draft of a standard. The Task Force supports participation by the Attorneys General in the CPSC performance standard setting process.

The Task Force also supports development of a mandatory performance standard by the U.S. Congress. In the event that legislation is sponsored concerning an ATV performance standard, NAAG should designate Attorneys General to testify either in support of or opposition to the performance requirements proposed, depending on the nature of the standard.

In the event that the CPSC and Congress fail to adopt a standard, the Task Force also supports individual state adoption of legislation which includes a mandatory performance standard. Our analysis of the CPSA indicates that once the CPSC has adopted a standard, however, individual states may be precluded from doing so under the Act's preemption provision, 15 U.S.C. §2075, unless the state standard adopted is identical to that of the CPSC.

5. ADVERTISING

From the outset, the industry has advertised and marketed ATVs as *all* terrain vehicles, showing riders of all ages performing daring feats in apparent perfect safety. The Task Force believes that the advertising campaigns of the various manufacturers have falsely represented the characteristics of ATVs, with the direct result that misinformed consumers have bought ATVs by the hundreds of thousands, believing them to be a safe, reliable, and fun method of transportation.

ATVs are not safe. They are not reliable. They are not "fun" toys. They are in fact inherently dangerous vehicles which take a great deal of skill and knowledge to ride, and which can kill and maim even the most experienced rider.

Accordingly, the Task Force concludes that the advertising of these machines must be substantially changed to ensure that no one who buys or rides an ATV is deceived into believing that ATVs are anything other than dangerous machines to be ridden only at the risk of serious injury or death. The Task Force supports the Decree's provisions that the industry develop ATV advertising guidelines and engage in a corrective advertising campaign to alert consumers to the skills needed for, and the potential hazards and risks associated with, ATV riding. We recommend the following:

ATV Advertising Guidelines

The guidelines contemplated by the Decree are intended for future ATV image advertising. Image advertising includes the types of terrain on which ATVs are ridden, speeds at which they should be driven, ATV stability, need for training, and appropriate ages of riders. There must be ample opportunity for comment by the states, the federal government, consumer and safety groups, rider groups, and other interested parties.

The following basic precepts should be adopted for ATV advertising:

- NO riding which requires expert skills.
- NO person should be under 16 years of age.
- NO representation that an ATV is easy to operate.
- NO aggressive recreational behavior.
- NO risk-related performance, such as driving in water, wheels leaving the ground, or any other stunt.
- NO claim that an ATV is usable on all terrains.
- SHOW all protective equipment required by law or recommended by the industry (such as helmets, eye protection, gloves, boots, and heavy clothing).

A warning of the risks of ATV use should be immediately included in all advertisements. The warning must be meaningful, substantial, clear and conspicuous. This will vary by advertising medium At a minimum, all broadcast commercials should contain a warning such as that used in the ATV Safety Alert contained in the Decree:

"An ATV is not a toy and may be dangerous to operate."

This statement, or a similar one, should be made in every commercial. It should not be contained only in a super which is visible for just a few seconds.

Print advertisements should contain that language, as well as considerably more detailed warnings. Print lends itself to more detailed information about the risks of ATVs, and that opportunity must be taken.

Corrective Advertising

The Decree provides that the industry must develop a corrective advertising campaign addressing the potential hazards and risks associated with ATVs. Presumably, this is in recognition of the fact that past advertising has deceptively promoted ATVs as safe.

Corrective advertising must tell consumers unqualifiedly that an ATV is a dangerous machine.

The warnings contained in the ATV Safety Alert are a good starting point. These, or stronger statements must be emphasized in such a campaign.

Care must be taken to ensure that this corrective advertising campaign does not become a puff piece for the industry or for ATVs. The sole message should be the potential risks and hazards of ATVs.

6. WARNING & NOTICES AT POINT OF SALE

In the opinion of the Task Force, all consumers must be adequately warned of the serious risk of death and injury associated with ATV use, prior to any purchase of an ATV. At a minimum, these warnings and notices should be made through the use of labels, hanging tags and owner manuals. Further, the language used in these warnings must be much stronger than that employed in the past by the Industry. The scope of these warnings and notices should be as follows:

Warning labels

The Task Force endorses the language of the Decree requiring the industry to develop safety warning labels. Additionally, the Task Force believes the language regarding format, location, durability, and readability of the labels is acceptable. However, the Task Force is extremely concerned over the exact language used in the labels. For example, we believe all labels should be captioned with an insignia such as the skull and crossbones. The skull and crossbones is universal and easily understood. In addition, that insignia had been previously used on ATVs by at least one company that had been in the business of leasing them to the general public. The labels must also contain the detailed warnings set forth in the Decree. It must be stressed, however, that in order for these warning labels to be effective, they must, in no uncertain terms, inform potential consumers that ATVs are an extremely dangerous vehicle requiring special riding skills, which, if not followed, could likely lead to severe injury or death.

Hang tags

The Task Force believes that the language in the Decree requiring the industry to distribute vehicle hang tags for all ATVs is another adequate method, when combined with other methods, of warning consumers of the hazards associated with ATV use. However, the hang tags used by the industry in the past have been wholly inadequate because they failed to adequately warn consumers of the risks associated with ATV use. To be effective, the hang tags must contain all the warnings set forth on the vehicle warning labels and consumer verification form. Again, we suggest that a skull and crossbone insignia be used on all hang tags. Furthermore, the hang tags should be attached with some sort of material which must be cut off prior to removal, as opposed to the strings used in the past by the industry.

Owner's manual

As in the case with hang tags, notices and warnings contained in the owner's manuals for ATVs have failed to warn consumers adequately of the risks and dangers associated with ATV use. The warnings set forth in the Decree are a step in the right direction. However, the key to any warning is the use of appropriate language. The language cannot be nearly as soft as the industry has used in the past, but should effectively alert and caution the consumers as to the dangers and hazards associated with ATV use.

In addition to the warnings already required by the preliminary injunction, the owner's manual must also include warnings regarding the following:

- minimum age of 16
- prohibition against double riding
- prohibition against excessive speeds
- prohibition against aggressive recreational use including doing any wheelies, jumps or other stunts
- prohibition against operating an ATV without taking an approved safety course
- prohibition against use of drugs or alcohol while driving an ATV
- prohibition against using the ATV on roads and other paved surfaces
- prohibition against using an ATV without adequate safety equipment
- disclosing that failure to follow all warnings and notices contained in the owner's manual can cause the ATV to roll over and/or lead to death or serious bodily injury

The Task Force recognizes that there is a limit to the number of warnings that may be included on labels and hanging tags. However, this does not apply to owner's manuals because they allow for detailed descriptions and explanations. Hence, not only should the owner's manuals list the various warnings and notices, they should in detail, discuss both why the warning exists in the first place and what the consequences are for failing to follow the particular warnings or notices.

7. SAFETY VERIFICATION FORM

The Task Force concludes that the safety verification form mandated by the Decree is seriously flawed. As part of the Decree, manufacturers are required to obtain signatures of ATV purchasers on an ATV safety verification form. The form warns customers about certain dangers faced by users of ATVs.

The major problems with the safety verification form are:

1) The major effect of the safety verification form may be to allow manufacturers to avoid liability for sale of a defective product. The Decree and the form itself should include a stipulation that the customer's signature on the safety verification form or proof that the salesperson explained the verification material does not constitute a waiver of liability or evidence of comparative negligence or assumption of the risk of death or injury.

2) There is no agreement as to when the safety verification form is read to the purchaser. It would not appear to be a violation of the Decree if the manufacturers ask the dealers to supply this information after the purchase has been completed. The information should be read to potential consumers prior to any consumers' commitment to purchase. The warnings should be given before the commitment and the consumer should be advised to read and think about the warnings and the dangers of ATV use before deciding whether or not to purchase the ATV. It should be provided to the consumer at the time the consumer expresses an interest in purchasing the ATV.

3) The form does not give sufficient information. If the form is to be used, it should be more complete. The significant warnings the settlement requires the manufacturers to supply to *previous* purchasers should be included in the safety verification form provided to prospective purchasers. The warnings to previous purchasers include valuable numerical death and disability information and warnings about potential paralyzing injury. Specifically, manufacturers are required to state that:

- Over 900 people, including many children, have died in accidents associated with ATVs since 1982.
- Many people have become severely paralyzed or suffered severe internal injuries as a result of accidents associated with ATVs.
- Thousands of people have been treated in hospital emergency rooms every month for injuries received while riding an ATV.

The warnings to *prospective* purchasers do not contain these facts.

The form now required does not give sufficient use information to consumers; for example, the form instructs the purchaser not to drive an ATV at excessive speeds. That term is not defined. Most ATVs do not even have speedometers. Consumers are not likely to be influenced by this statement since no product should be driven at excessive speeds. The purchaser should be informed that ATVs are dangerous at any speed and that the danger increases with increased speed.

4) The most glaring deficiency on the form as it is now, is its failure adequately to advise consumers that adherence to all of the warnings will not eliminate the risk of death and injury associated with ATV use.

8. STATE LEGISLATIVE INITIATIVES

The Task Force recommends that any state legislation should include at least the following requirements:

1. Set age limits on operators, prohibiting use by children under 16 years of age (possibly with a limited exception for agricultural use);

2. Require all ATV riders to complete a mandatory rider safety and training program prior to operation of an ATV. States may wish to refrain from mandating any specifics of a training program until there has been an opportunity to examine the effectiveness of the training program requirement contained in the Decree. In any event, the Task Force believes the training program set forth in the Decree should be free and available to anyone who has purchased an ATV in the past;

3. Impose operational requirements on operators, such as use of helmets and other protective gear and prohibitions on carrying of passengers;

4. Require operators to obtain liability insurance; and

5. Require operators, manufacturers and dealers to register all ATVs.

9. FEDERAL LEGISLATIVE INITIATIVES

There are at least two bills pending in the U.S. Congress addressing ATVs. As a result of the federal settlement, it is very likely that additional legislation will be introduced in upcoming months. The Task Force urges your support of Congressional initiatives, concurrent with state jurisdiction, that will aid in the achievement of the recommendations contained in this report.

Recommendations of the National Association of Attorneys General's Task Force Studying All-Terrain Vehicles

- **Ban the sale of three-wheeled ATVs.**

"The task force finds that current three-wheeled ATVs have design defects which render them imminently and unreasonably hazardous consumer products," task force members wrote in their report. "Accordingly, the task force recommends an immediate ban on the sale of all three-wheeled ATVs."

- **Ban the sale of adult-sized three- and four-wheeled ATVs to children under 16 and ban the sale of all child-sized ATVs.**

"The task force concludes that children are not able (to adequately) handle ATVs," the report states. "Children under 16 cannot operate cars in most states, and there is no reason they should be operating ATVs. ATVs are not toys. They are vehicles that in inexperienced and immature hands produce death and catastrophic injury."

- **Provide refunds to consumers who purchased any three- and four-wheeled ATVs.**

"Manufacturers have profited by their unfair and deceptive practices in marketing ATVs," the report states. "They should not be permitted to retain profits obtained from a deceived public and obtained from the sale of inherently dangerous products."

- **Develop a mandatory consumer product safety standard consisting of performance requirements for ATVs.**

"The performance standard must be one which results in changes in design of currently or previously manufactured ATVs," the report states. "An ATV mandatory performance standard should be developed and implemented within one year."

- **Change the advertising of ATVs.**

"At a minimum, all broadcast commercials should contain a warning such as ... 'An ATV is not a toy and may be dangerous to operate'," the report states. "Print advertising should contain that language. The decree provides that the industry must develop a corrective advertising campaign ... corrective advertising must tell consumers unqualifiedly that an ATV is a dangerous machine."

• Place warning labels on all ATVs and in the owner's handbook.

"We believe all labels should be captioned with an insignia such as the skull and crossbones," the report states. "All consumers must be adequately warned of the serious risk of death and injury associated with ATV use."

• Require manufacturers to adopt more detailed safety verification forms that warn consumers of the dangers of ATVs.

" The most glaring deficiency on the form as it is now," the report states, "is its failure to adequately advise consumers that adherence to all of the warnings will not eliminate the risk of death and injury associated with ATV use."

• Urge state lawmakers to adopt more stringent ATV regulations.

"Any state legislation," the report states," should include . . . age limits on operators, prohibit the use by children under 16, require all ATV riders to complete mandatory rider safety and training programs . . . and require operators to obtain liability insurance."

• Support Congressional legislation that calls for more stringent ATV regulations.

"There are at least two bills pending in the U.S. Congress addressing ATVs," the report states. "The task force urges your support of Congressional initiatives, concurrent with state jurisdiction, that will aid in the achievement of the recommendations contained in this report."

Mr. BARNARD. Jim, would you like to identify your associate there this morning?

STATEMENT OF JAMES SHANNON, ATTORNEY GENERAL, STATE OF MASSACHUSETTS, ACCOMPANIED BY SUSAN ROBERTS, ASSISTANT ATTORNEY GENERAL

Mr. SHANNON. I am joined here by Assistant Attorney General Susan Roberts from Massachusetts, who has played not only a role in Massachusetts, but also has worked with the National Association of Attorneys General on this very important issue.

Mr. Chairman, thank you very much. Members of the committee, I thank you, on my behalf and on behalf of my colleague, Mr. Abrams. As you pointed out, Mr. Chairman, he has been appointed special prosecutor in a very significant, vicious attack, racially motivated, in the State of New York, and had to be there today to tend to his responsibilities as special prosecutor.

I wanted to thank you for the opportunity to testify about a serious consumer safety issue that deserves your attention—I know it has had your attention for the last several years—the millions of all-terrain vehicles, or ATV's, in use across the country.

I, and many other attorneys general have been alarmed by the injuries and fatalities linked to ATV's. The manufacturers tell us that the vehicles are safe, it is the drivers who are reckless or untrained. But we see a different story.

In Massachusetts, there have been 17 ATV-related deaths. Five of those riders were children; two were only 6 years old.

The Consumer Product Safety Commission has taken an important first step through its consent decree with the ATV manufacturers. The problem is that the Commission views this as a solution. I and the National Association of Attorneys General view it as only a beginning. The agreement contains some safety promoting provisions, but does not provide consumers with the level of protection that they need.

The decree presumes that careful, experienced riders can avoid injury. This is simply inaccurate. I know of a young man in Massachusetts, a man in his twenties, who was thrown from his ATV and today is paralyzed.

Bill Ledger was an experienced motorcycle rider who chose to buy a four-wheel ATV because he believed them to be safer than the three-wheel vehicles. Bill did more than follow the rules. He wore a helmet, boots, a kidney belt, and he did his riding on the marked ATV trails that criss-cross the middle part of Massachusetts.

But 3 months after getting the ATV, his vehicle hit a series of small bumps which caused it to sway and finally flip on top of him. Bill is struggling to walk again today, a struggle brought on by inherent safety defects, not, as the manufacturers would have us believe, because of rider misuse.

Bill Ledger received no safety warnings from the dealer and no driving tips. In fact, Bill told me that after writing a check for his four-wheeler, the salesman smiled, handed him the keys and said, "Have a ball."

Yet, under the decree, the manufacturers will cease sales only of three-wheel ATV's. Current owners of three-wheel ATV's are offered no incentive to stop riding their vehicles since the decree does not provide them with the opportunity to obtain a refund.

The unsafe four-wheel vehicles will continue to be sold. According to the decree, the industry has agreed to negotiate with the Commission about a performance standard for the four-wheel vehicles; but sales will continue without the standard.

These gaps in the agreement mean that consumers are still vulnerable. Care and experience is no substitute for basic vehicle safety and stability. ATV's are not safe and the decree does not require them to be. ATV's do not have adequate suspension systems or an effective rear-wheel differential to provide needed stability. Other poor design choices have created a defective, lethal machine which millions of riders take to the backroads every weekend.

The manufacturers proudly advertise ATV's as rider-sensitive. In reality, these vehicles often fail to properly respond to the operator. It is simply not a coincidence that many ATV rider injuries and deaths are noted in hospitals as, and I quote, "an inability to avoid an object."

What makes ATV's so frightening and dangerous is that they appear to be safe. These stable looking, solid vehicles resting on three or four oversized tires have undoubtedly deceived consumers into believing that ATV's are a safe alternative to other recreational vehicles. In fact, many consumers have purchased ATV's for their children, making a false assumption that they are safer than two-wheel dirt or trail bikes.

Unquestionably, the decree will be of some help in reducing ATV-related injuries and deaths, but it is woefully inadequate. We need to do much more. We must take greater steps to ensure consumers' safety. We must suspend the sale of all three- and four-wheeled ATV's until manufacturers can demonstrate a marked improvement in safety and stability.

We must insist that manufacturers institute a meaningful performance standard on which they can be judged and, ultimately, held accountable. Finally, we must institute a recall program to encourage consumers to return these vehicles.

Warnings, labels and changes in the owners' manuals will not make ATV's safe. These requirements will not rid us of their continued hazardous operation. The vehicles must be redesigned if riders are to be protected from serious harm. We must make efforts to remove them from our backroads.

In the last 5 years, 900 people have died and 335,000 have been injured in ATV-related accidents. Nearly half of those deaths have been children. I would remind all of us that the Pinto was recalled after 61 deaths, and the Dalkon Shield after only 20 deaths.

I would like to add, Mr. Craig, and I agree with you completely, that the States have a very important role to play here. I wouldn't come here today looking for an answer to this problem if I weren't already working with my State legislature.

But I think we have to recognize that this problem goes beyond licensure and regulation at the State level. We have an inherently defective product here, and the only way that we are going to be able to offer the consumers, young and old, of this country the kind of protection they deserve is to take action here in Washington.

Thank you.

[The prepared statement of Mr. Shannon follows:]

TESTIMONY OF ATTORNEY GENERAL JAMES SHANNON

BEFORE THE HOUSE GOVERNMENT OPERATIONS SUBCOMMITTEE ON COMMERCE, CONSUMER AND MONETARY AFFAIRS

JANUARY 28, 1988

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify about a serious consumer safety issue that deserves your attention -- the millions of all terrain vehicles or ATVs in use across the country.

I and many other Attorneys General have been alarmed by the injuries and fatalities linked to ATVs. The manufacturers tell us that the vehicles are safe; it's the drivers who are reckless or untrained. But, we see a different story.

In Massachusetts, there have been twelve ATV-related deaths. Five of those riders were children; two were only six years old.

The Consumer Product Safety Commission has taken an important first step through its consent decree with the ATV manufacturers. The problem is that the Commission views this as a solution. I and the National Association of Attorneys General view it as only a beginning. The agreement contains some safety promoting provisions, but does not provide consumers with the level of protection that they need.

The decree presumes that careful, experienced riders can avoid injury. This is simply inaccurate. I know of a young man in Massachusetts, for example, who was thrown from his ATV and today, is paralyzed.

Bill Ledger was an experienced motorcycle rider who chose to buy a four wheel ATV because he believed them to be safer than the three wheel vehicles. Bill did more than follow the rules. He wore a helmet, boots, a kidney belt, and he did his riding on the marked ATV trails that criss-cross the middle part of Massachusetts. But three months after getting the ATV, his vehicle hit a series of small bumps which caused it to sway and finally flip on top of him. Bill is struggling to walk again today -- a struggle brought on by inherent safety defects, not, as the manufacturers would have us believe, because of rider misuse.

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Warnings, labels and changes in the owners' manuals will not make ATVs safe. These requirements will not rid us of their continued hazardous operation. The vehicles must be redesigned if riders are to be protected from serious harm. We must make efforts to remove them from our back roads.

In the last five years, 900 people have died and 335,000 have been injured in ATV related accidents. Nearly half of those deaths have been children. I would remind all of us that the Pinto was recalled after 60 deaths and the Dalkon Shield after only 20 deaths.

I urge the Congress to ban ATVs and order their recall until such time as they can be made safe.

Mr. **Barnard**. Mr. Shannon, I want to first of all commend you and the fine work that has been done by the National Association of Attorneys General, that task force, and the young lady here today representing them. Your report is comprehensive, and it supports those of us who have expressed concerns about the Consumer Product Safety Commission settlement, inasmuch as it is inadequate and doesn't do the job.

The Attorneys General Association Task Force report finds that the safety verification form mandated by the decree is seriously flawed, and you give several reasons. You also have several suggestions including that the form should state that it does not constitute a waiver of liability.

Now, this is an excellent suggestion, and the report contains several suggestions which must be incorporated in the final decree. Does the National Association of Attorneys General intend to intervene to provide the court with these suggestions if there is a public hearing on this matter?

Mr. **Shannon**. We are, of course, discussing that now, but I am sure that in any proceedings concerning ATV's, whether it be for the Commission or in court, there will be some participation by the National Association of Attorneys General, either by way of filing a brief or intervening in the process itself.

Mr. **Barnard**. Thank you.

Mr. Craig.

Mr. **Craig**. Thank you very much, Mr. Chairman.

Mr. Shannon, thank you for your testimony. A couple of questions of curiosity. One of the things that I have never been able to sort out in my mind with those who advocate a ban and a total recall, it appears that there are well over 1.5 million of these primarily three-wheelers on the market, and we know that 70 to 80 percent of those who own them like them and don't want to give them up.

How would this country—and you are a man of the law and have worked in these areas—how would this country go about getting them back? Would they send marshals out to retrieve these?

Mr. **Shannon**. Not at all. The problem with the decree as we see it, the National Association of Attorneys General sees it——

Mr. **Craig**. I said if, if there was a ban and absolute recall of all vehicles.

Mr. **Shannon**. What I would like to see is a ban on future sales of ATV's, with a refund program, so people can return the ones that they have. There are people who have bought ATV's who will say, "I don't care how dangerous my ATV is. I am going to continue using it anyway, and I don't think it really is dangerous, and I am not going to return it."

I am not suggesting at all that any action should be taken against those consumers. I think, however, that people who have gone out and spent a considerable amount of money, believing these were perfectly safe vehicles, should have an opportunity to return those vehicles and get a refund. They should be notified that there are dangers to those vehicles, and told that they probably should return them.

Now, if they decide not to return them, then at that point, is up to them, as far as I am concerned. But I think the fact of the matter is, we have millions of vehicles out there and inspite of everything we do and all these television cameras here, there are many people who still won't know they are dangerous. They are going to think they are toys and they are safe.

We have to protect them.

Mr. CRAIG. That helps to answer it, because I thought that you were one who was advocating total ban, total recall. You are only talking about ban of future sales?

Mr. SHANNON. I would notify people that they are dangerous and allow them to bring their ATV's in on a voluntary [illegible] they don't, there is nothing we can do about that.

Mr. CRAIG. One of the statements you made for the record that I guess has me a bit concerned is that you talk about the inherent flaw in the machine and that it is inherently unstable. It is interesting to note, because for those of us who have ridden them, we know they are uniquely different from a two-wheeled motorcycle or a four-wheeler ATV.

That we know, and the moment you get on one, you sense that uniqueness if you have ever ridden a motorized vehicle, but to say they are flawed is an interesting statement, because we just have concluded a 67-day trial in California in which that was the point of argument. And the jury said, "huh-uh" "no buy it" "wrong conclusion."

Honda won in this instance. Now, it is interesting that that still remains the argument. I am sure it will, but it appears that the manufacturers are able to take their facts to a jury and say, here they are, you judge. And courts have just judged in California and said, "no," that that is not the case. There may be other problems, but to say that there is a negligence in the design or that they inherently are flawed is not the argument that will win.

Mr. SHANNON. Well, Mr. Craig, I am not familiar with the particular trial in California, but if I could, I would just like to tell you how we get into this and why I am personally involved with this.

It is because it was brought to our attention that there were a large number of deaths and serious injuries with these vehicles in Massachusetts. We don't jump to the conclusion that the problem is with the vehicle.

We begin to ask the question, why is this occurring. We got experts in to advise us on it, and we shared information with the other attorneys general and have been working on this issue for some considerable length of time. There was a considerable consensus of opinion that there are inherent flaws in the design of these materials, that the suspension systems, the center of gravity——

Mr. CRAIG. I know all about that. I am a rider of them.

Mr. SHANNON. I understand that. All of those things make them inherently defective products. That is where the argument comes from. The question is, does the totality of the design of ATV's rise to the level where we can say that they are inherently defective products?

I would say that that is the case, that there is no amount of warning or training that you can give to people that would provide them with an adequate amount of protection against this product. That is where I think we disagree.

Mr. **Craig**. Well, the case has just been decided in California in the last few days, so you will be hearing about it. It will be on the record. But that is where we have to disagree, and thank goodness I have got the courts and juries to back me up.

I have looked at the expert testimony.

Mr. **Barnard**. Is that the law of the land?

Mr. **Craig**. No. I am not an attorney. I take the advice of them.

Mr. **Shannon**. Without knowing the facts, I can find several good plaintiff's attorneys in Massachusetts who would be willing to take that case before a Massachusetts jury.

Mr. **Craig**. I am sure they would like to, because there would be very big bucks involved.

Thank you.

Mr. **Barnard**. Who has those bucks? It is not the consumer.

Mr. **Shannon**. It is not the attorneys general, either, Mr. Chairman.

Mr. **Barnard**. Thank you very much for being with us. Your testimony has been very helpful. We appreciate the work of the National Association of Attorneys General in this regard.

Mr. **Shannon**. Thank you, Mr. Chairman.

Mr. **Barnard**. Our next panel of witnesses will include Hon. David Pittle, former Commissioner, Consumer Product Safety Commission, presently technical director, Consumer Reports. Mr. Pittle will take his place at the table. And the Honorable Stuart M. Statler, former Commissioner of the Consumer Product Safety Commission, who is now vice president of A. T. Kearney, Inc.

Gentlemen, we welcome you to the hearing, and we appreciate very much the cooperation in coming and offering testimony in what we think are very important hearings in view of the pending date of February 13, when the settlement is going to be adjudicated.

With that, we will hear from Mr. Pittle first and hear from Mr. Statler after that.

STATEMENT OF DAVID PITTLE, FORMER COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION, PRESENTLY TECHNICAL DIRECTOR, CONSUMER REPORTS

Mr. **Pittle**. Thank you, Mr. Chairman. I appreciate the opportunity to appear before you this morning to discuss the CPSC's preliminary settlement of its action involving all-terrain vehicles. It is vital for the proper functioning of a Federal regulatory agency that such oversight hearings be held when important public policies are being considered.

In the interest of time, I will focus my remarks primarily on the settlement itself. But I would like to begin with a general comment about regulatory decisionmaking. I served as a CPSC Commissioner for 9 years, under four different Presidents. During that time, the agency was confronted with hundreds of product safety problems, all of which required some kind of decision by the Commissioners.

In considering whether to ban, set a product safety standard, order a recall, warn the public, educate the public or do nothing, the Commission always had to weigh a staggering amount of technical, economic, legal and injury data against what each Commissioner thought was the appropriate Federal response as mandated by the CPSA.

Having been through numerous situations as complex as the ATV case, my tendency is to give the agency decisionmaker some benefit of the doubt. After all, from where I stand today, I cannot assess all the complications and tradeoffs that generally occur.

But somehow I am not surprised by the current state of affairs, especially in light of some of the public statements made by the Commission's Chairman, Terrence Scanlon. For example, I would like to quote from one of his speeches:

> For better or for worse, data is the basis upon which regulatory decisions are made, not just at the CPSC but at most of the other regulatory agencies as well. If the facts and figures are solid—and by that I mean accurate, complete and timely—then the prospects for an equitable regulatory decision are enhanced. But, if the data is inaccurate, unrepresentative or misleading, then the potential for mischief is compounded.

I couldn't agree more with Mr. Scanlon. I believe Mr. Craig will, as well.

But he goes on later to give specifics:

> First of all, we need to look at personal behavior as it relates to an accident, not just at the fact a consumer product was involved. If, for instance, someone picks up a lawnmower and uses it to trim their hedge, cutting off several fingers in the process, that can hardly be considered the fault of the lawnmower, or of the manufacturer who produced it. Likewise, if somebody is so drunk that he or she falls off an ATV and smothers in the sand, that shouldn't be counted against the all-terrain vehicles, at least not to my way of thinking.

Since I have been searching without success for more than 17 years to find a single documented case of someone being injured using a lawnmower to trim hedges, I have asked Mr. Scanlon several times for the specific case he was referring to. I even offered to buy him dinner at any restaurant in this town if he showed me the case.

He assured me that he was aware of such a case, but to date no information has arrived. Mr. Chairman, perhaps you can help me out and when he comes up here as a witness, you might ask him for a cite.

As I said, I agree with Mr. Scanlon that data should be accurate and representative—otherwise mischief can take root.

Frankly, I worry when the country's leading product safety official has an apparent predisposition to blame consumers' injuries on stupid behavior. It is a disservice to the millions of consumers who were injured or killed while using products in predictable ways.

Looking further, Mr. Scanlon was the lone dissenter from the Commission's decision to seek recall of ATV's. Actually, I wasn't surprised by his vote. He is entitled to that.

But I was stunned by his move in mid-1987 to scatter and disrupt the legal staff working on the case. It had the effect of setting the whole proceeding on its ear. With the staff leadership in disarray, chances for success in obtaining a recall were greatly damaged, and led in part to why we are all here today.

In view of his track record, then, I do not believe Mr. Scanlon deserves even the slightest benefit of the doubt.

I would like now to focus on the settlement. The industry marketed ATV's vigorously several years ago and aimed their pitch directly at young people. Unfortunately, their ads were a smashing success. When the injury data first indicated that there was a serious problem, the industry resisted corrective action by saying such things as the data was flawed, there was no real problem and, because of product misuse, it was all the consumer's fault.

From the Commission's decision in December 1986, it is clear that a majority of the Commissioners came to believe these products were so dangerous that only a recall would adequately protect the millions of current users.

Even from a distance, it seemed clear to me that their decision was the correct one, albeit tardy. But looking at the preliminary settlement reached after a year's work, they came away empty-handed. There is virtually no meaningful protection anywhere in the agreement that helps current users—they remain at risk and are likely to continue suffering the same devastating rate of injuries and deaths.

Mr. Scanlon and others have argued that the industry vowed a prolonged fight over the issue of recall, and that the costs of pursuing the lawsuit would be large. I have no reason to doubt the industry's determination to resist recalling their products, and that the court proceeding would be a long and expensive one.

But given the serious and widespread nature of the risk, this is precisely the kind of problem the Commission is charged by Congress to tackle. No other agent in our society has the public mandate and the resources to correct this defect in our marketplace.

If not CPSC, then who? It is wholly unacceptable for this Commission to shrink from its responsibility simply because of strong resistance from the industry. They should reject the final settlement and reconsider the merits of the lawsuit. To do otherwise leaves millions of consumers at risk holding the bag.

It is bad enough that a recall provision is absent from the settlement, but much of what is included is equally troubling. So as to avoid seeming like a total cynic, let me first rush to applaud the provision that memorializes the passing of the three-wheel models from the sales floor. Although the industry had long ago decided to cease manufacturing products of this design, stopping the sale of products remaining in the chain of distribution, even though a small percentage of total sales, is meaningful and should be recognized as such.

But the rest of the settlement is far from useful in reducing injuries and deaths in a significant way. The program is addressed primarily at future owners, not current owners, by, first, offering free training courses to users owning the vehicle for 1 year or less and, second, obtaining from the purchaser a signed verification that he or she fully understands the consequences of not complying with a lengthy set of warnings.

No one can argue that either education programs or warnings are the wrong thing for a manufacturer to provide consumers. Quite the contrary, it is the prudent thing to do.

But in the face of an overwhelming amount of injury data, it is naive—even irresponsible—to depend on such schemes to reduce the risk to any significant extent. Trying to change predictable consumer behavior to compensate for an inherently hazardous design is doomed to fail. And it is not as though the Commission is new to this issue.

Over the years it has tried several major efforts to reduce death and injury by way of consumer education and has not succeeded. I offer for inclusion in the record a study conducted by a former colleague, Robert S. Adler, and me on precisely this issue. It appears in the Yale Journal of Regulation, title of which is "Cajole or Command, Our Education Campaigns, an Adequate Substitute for Regulation." I don't want to go into the details of it, but it is on this point.

Mr. BARNARD. Without objection, we will enter that at the end of your testimony.

Mr. PITTLE. Thank you.

I am particularly concerned about including the safety verification provisions into the final agreement. This scheme envisions the purchaser reading and signing a comprehensive list of do's and don'ts, presumably at the moment prior to the actual purchase. A brief look at the list of warnings demonstrates why it will have limited effectiveness.

For example, the purchaser agrees that they must never carry a passenger, drive on pavement, lend the ATV to an untrained user, drive at excessive speeds, do wheelies and other stunts, and must always be extremely careful at turns and on hills, leaves a lot to be desired.

Furthermore, they sign a statement that they understand all of the warnings and that failure to obey these warnings could result in death or severe bodily injury, is not going to be successful.

Out in the field there is only one speed on that vehicle for a 14-year-old, the top speed. Regardless of whether his or her parents sign the sheet of paper saying they wouldn't drive fast.

While I believe it is a good idea in general to give warnings to consumers, I have major misgivings about CPSC, the Federal agency involved, accepting this concept as part of its settlement in solving a major safety problem. Even if followed explicitly, these warnings are inadequate and will fail to bring about a significant reduction in the risk. But more importantly, the signed declaration will no doubt be used to insulate the manufacturer from liability. Having it endorsed by the Federal Government will only enhance the manufacturer's protection while providing little to the consumer.

In summary, I find the preliminary settlement weak and not likely to reduce the serious risk posed by these products. The Commission's decision to abandon current users without even trying to use their authority and resources to obtain a recall is inexcusable.

If they believe they lack either, they should come before you seeking whatever they need to accomplish their mandate that you gave them. And under no circumstances should the final agreement contain anything resembling the safety verification program.

On a final note, as I read over the safety verification program and agreement which is meant to gain commitments from consumers, I created a slightly different safety verification program that I think I wish the Commissioners had read and signed. It is very short.

I understand that I must always recognize CPSC's congressional mandate to place consumer safety as our highest priority, limited only by the requirement of the benefits of our actions bear a reasonable relationship to the costs.

I understand that I must always remember that it is easier and more effective to change products than it is to change people. I understand that I must never become fixated on assessing blame but rather on problem solving, and I understand that I must never use unrepresentative or hypocritical stories and publish statements lest they set a public tone that consumers are stupid oafs whose only foolish behavior defies protection. To engage in this practice only leads to mischief.

Thank you, Mr. Chairman.

Mr. **Barnard**. Thank you very much. I am glad you didn't write one up for Congress.

[The prepared statement and the Yale Journal of Regulation article follow:]

REMARKS OF R. DAVID PITTLE, PH.D.

TECHNICAL DIRECTOR
CONSUMERS UNION *

January 28, 1988

BEFORE THE
COMMERCE, CONSUMER, AND MONETARY AFFAIRS
SUBCOMMITTEE
of the
COMMITTEE ON GOVERNMENT OPERATIONS

*Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 3.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

I appreciate the opportunity to appear before you this morning to discuss the CPSC's preliminary settlement of its action involving all-terrain vehicles. It is vital for the proper functioning of a federal regulatory agency that such oversight hearings be held when important public policies are being considered.

In the interest of time, I will focus my remarks primarily on the settlement itself. But I would like to begin with a general comment about regulatory decisionmaking. I served as a CPSC commissioner for nine years, under four different presidents. During that time, the agency was confronted with hundreds of product safety problems, all of which required some kind of decision by the commissioners. In considering whether to ban, set a product safety standard, order a recall, warn the public, educate the public or do nothing, the Commission always had to weigh a staggering amount of technical, economic, legal and injury data against what each commissioner thought was the appropriate response as mandated by the CPSA.

Having been through numerous situations as complex as the ATV case, my tendancy is to give the agency decisionmaker some benefit of the doubt. After all, from where I stand today, I cannot assess all the complications and tradeoffs that generally occur.

But somehow I am not surprised by the current state of affairs, especially in light of some of the public statements made by [illegible] Scanlon. For example, I would like to quote from one of his speeches:

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Since I have been searching without success for more than seventeen years to find a single documented case of someone being injured using a lawnmower to trim hedges, I have asked Mr. Scanlon several times for the specific case he was referring to. He assured me that he was aware of such a case, but to date no information has arrived. Mr Chairman, I have become skeptical that the case even exists. And I am equally skeptical about someone falling off an ATV and smothering in the sand. As I said, I agree with Mr. Scanlon that data should be accurate and representative--otherwise mischief can take

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root.

Frankly, I worry when the country's leading product safety official has an apparent predisposition to blame consumers' injuries on stupid behavior. It is a disservice to the millions of consumers who were injuried or killed while using products in predictable ways.

Looking further, Mr. Scanlon was the lone dissenter from the Commission's decision to seek recall of ATVs. Actually, I wasn't surprised by his vote. But I was stunned by his move in mid 1987 to scatter and disrupt the legal staff working on the case. It had the effect of setting the whole proceeding on its ear. With the staff leadership in disarray, chances for success in obtaining a recall were greatly damaged.

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From the Commission's decision in December, 1986, it is clear that a majority came to believe these products were so dangerous that only a recall would adequately protect the millions of current users. Even from a distance, it seemed clear to me that their decision was the correct one, albeit tardy. But looking at the preliminary settlement reached after a year's work, they came away empty-handed. There is virtually no meaningful protection anywhere in the agreement that helps current users--they remain at risk and are likely to continue suffering the same devastating rate of injuries and deaths.

Mr. Scanlon and others have argued that the industry vowed a prolonged fight over the issue of recall, and that the costs of pursuing the lawsuit would be large. I have no reason to doubt the industry's determination to resist recalling their products, and that the court proceeding would be a long and expensive one. But given the serious and widespread nature of the risk, this is precisely the kind of problem the Commission is charged by Congress to tackle. No other agent in our society has the public mandate and the resources to correct this defect in our marketplace.

If not CPSC, then who? It is wholly unacceptable for this Commission to shrink from its responsibility simply because of stong resistance from the industry. They should reject the final settlement and reconsider the merits of the lawsuit. To do otherwise leaves millions of consumers holding the bag.

It's bad enough that a recall provision is absent from the settlement, but much of what is included is equally troubling. So as to avoid seeming like a total cynic, let me first rush to applaud the provision that memorializes the passing of the three-wheel models from the sales floor. Although the industry had long ago decided to cease manufacturing products of this design, stopping the sale of products remaining in the chain of distribution, even though a small percentage of total sales, is meaningful and should be recognized as such.

But the rest of the settlement is far from useful in reducing injuries and deaths in a significant way. The program is addressed primarily at future owners by (1) offering free training courses to users owning the vehicle for one year or less and (2) obtaining from the purchaser a signed verification that he or she fully understands the consequences of not complying with a lengthy set of warnings.

No one can argue that either education programs or warnings are the wrong thing for a manufacturer to provide consumers. Quite the contrary, it is the prudent thing to do. But in the face of an overwhelming amount of injury data, it is naive--even irresponsible--to depend on such schemes to reduce the risk to any significant extent. Trying to change predictable consumer behavior to compensate for an inherently hazardous design is doomed to fail. And its not as though the Commission is new to this issue. Over the years it has tried several major efforts to reduce death and injury by way of consumer education and has not succeeded. I offer for inclusion in the record a study conducted by a former colleague, Robert s. Adler, and me on precisely this issue.

I am particularly concerned about including the safety verification provisions into the final agreement. This scheme envisions the purchaser reading and signing a comprehensive list of do's and don't's, presumably at the moment prior to the actual purchase. A brief look at the list of warnings demonstrates why it will have limited effectiveness. For example, the purchaser agrees that they _must never_ carry a passenger, drive on pavement, lend the ATV to an untrained user, drive at excessive speeds, do wheelies and other stunts, and _must always_ be extremely careful at turns and on hills. Furthermore, they sign a statement that they understand all of the warnings and that failure to obey these warnings could result in death or severe bodily injury.

In reality, there is only one speed on the vehicle for a 14 year old--the top speed. How will he or she say "no" when a friend asks for a short ride or to try it out for just a minute. Will they even want to? And not do wheelies?

While I believe it is a good idea in general to give warnings to consumers, I have major misgivings about CPSC accepting this concept as part of its settlement in solving a major safety problem. Even if followed explicitly, these warnings are inadequate and will fail to bring about a significant reduction in the risk. But more importantly, the signed declaration will no doubt be used to insulate the manufacturer from liability. Having it endorsed by the federal government will only enhance the manufacturer's protection while providing little to the consumer.

In summary, I find the preliminary settlement weak and not likely to reduce the serious risk posed by these products. The Commission's decision to abandon current users without even trying to use their authority and resources to obtain a recall is inexcusable. If they believe they lack either, they should come before you seeking whatever they need to accomplish their mandate. And under no circumstances should the final agreement contain anything resembling the Safety Verification Program.

Thank you for the opportunity to share my thoughts with you.

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Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?

by

Robert S. Adler and
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Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?

Robert S. Adler†
R. David Pittle††

Between the mid-sixties and the mid-seventies, the so-called "consumer decade,"[1] Congress enacted a large number of consumer protection laws, many in the area of health and safety.[2] In recent years, some of these laws and the regulations promulgated under them have inspired harsh criticism. Some critics,[3] including many Reagan Administration appointees,[4] have argued that rather than regulate, government should inform and

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[1] Of 47 federal consumer protection laws enacted between 1891 and 1972, fewer than half, or 21 statutes, were enacted in the first 75 years; the remaining 26 were enacted in the years from 1966-1972. This led some to call the latter period the "consumer decade." *See* Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 34 (1982).

[2] *See, e.g.*, National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 736 (codified at 23 U.S.C. § 105) (1982); Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (codified at 15 U.S.C. § 2051) (1982); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678) (1976 and Supp. V. 1981).

[3] *See* Weidenbaum, *Reforming Government Regulation*, REGULATION, Nov./ Dec. 1980, at 15: ("The traditional notion that . . . market failure is adequate justification for government intervention badly needs to be revisited . . . . For some regulatory programs . . . the provision of better public information may enable consumers themselves to make more sensible trade-offs (for example, between safety and price) than any standards set in Washington."); M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 227 (1980) (arguing government should provide health and safety information but leave citizens "free to choose what chances we take with our lives").

[4] *See, e.g.*, Remarks of Virginia Knauer, Special Assistant to President Reagan for Consumer Affairs, before the Agency for Instructional Television and the Joint Council on Economic Education, in Arlington, Va. (Mar. 29, 1982) ("[T]oday we are finally, openly admitting that consumers have to get the know-how and information to protect their own enlightened self-interests.") (on file with the *Yale Journal on Regulation*); *see also Hearings on the Nomination of Nancy Harvey Steorts to be Chairman and Member of the Consumer Product Safety Commission Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science and Transportation*, 97th Cong. 2d Sess. 43 (1981) (statement of Nancy Harvey Steorts) (stating that as Chairman of the CPSC, she planned to push for a "cooperative" rather than "adversarial" agency attitude toward industry and to put a "strong emphasis" on information and education programs).

Raymond Peck, President Reagan's first National Highway Traffic Safety Administration (NHTSA) administrator, demonstrated his faith in education campaigns by coupling his revocation of the automobile "passive restraint" rule with the announcement that NHTSA planned to implement a multi-year, multi-media information and education campaign designed to persuade drivers and passengers to wear seatbelts. 46 Fed. Reg. 53,419 (1981). *See infra* section II.A.

educate the public about the risks associated with various hazards and let individuals choose whether or not to take the risks.

Such a view is hardly novel. In fact, for several reasons the use of information and education[5] as alternatives to direct regulation has always appealed to government agencies. First, many regulators believe that large numbers of injuries and illnesses cannot be prevented through direct regulation.[6] Second, information and education programs seem to preserve individual choice while avoiding direct government involvement in industry's production and pricing activities.[7] Third, because information and education programs usually bypass the complex procedural schemes most agencies must follow in order to promulgate rules,[8] information and education programs permit—superficially, at least—easier and faster action than rulemaking. Finally, information and education programs can be used to enhance the image of agencies and their staffs—a point that is rarely lost on government administrators.

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[5] Although we use the terms "information" and "education" somewhat interchangeably, some researchers draw a distinction between them. Information programs are *notification* schemes that convey factual information, and nothing else, to the public. Implicit in the notification approach is the belief that the public, once apprised of the facts, will make more informed judgments. Education programs, on the other hand, are *persuasion* schemes that convey messages, which may or may not contain factual information, which overtly seek to motivate members of the public to modify their behavior.

Most government officials, including Reagan Administration appointees, have undertaken both types of programs without regard to any distinctions between them. As stated by former NHTSA Administrator Peck, it seems appropriate to employ the "behavior modification" techniques "that we use every day in selling cereal, in selling soap, [and] in selling political candidates" to save lives. *Joint Hearings on Small Car Safety Research Before the Subcommittee on Transportation, Aviation, and Materials and the Subcommittee on Investigations and Oversight of the House Committee on Science and Technology*, 97th Cong., 2d Sess. 309 (1982) (remarks of Raymond Peck) [hereinafter cited as *Small Car Safety Hearings*].

[6] *See Regulatory Reform Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 2nd Sess. 4 (1976) (statement of Richard O. Simpson, Chairman, Consumer Product Safety Commission) ("Most experts place the product-caused, or standards-preventable portion at somewhere between 15 percent and 25 percent of the total product-associated injury figure."); *See also* Miller & Parausraman, *Advising Consumers on Safer Product Use: The Information Role of the New Consumer Product Safety Commission*, 36 AM. MKTG. ASS'N PROC. 372, 373 (1974) ("The fact that at least 80 percent of the consumer product-related injuries may not be caused by defective or unsafe products suggests that consumer education has a very large untapped potential for reducing such injuries").

We suggest two qualifications to the view that only a small fraction of total injuries can be addressed by regulation while the remainder can be addressed by information and education. First, technology may transform hazards that seem susceptible to reduction only by information and education into risks that can be reasonably addressed by regulatory standards. For example, prior to the passage of the Refrigerator Safety Act of 1956, at 15 U.S.C. § 1211 (1982) (standard promulgated at 16 C.F.R. § 1750 (1983)), most observers may have assumed that consumer education directed at parents was the only way to prevent infant suffocation in abandoned refrigerators. The Act forced manufacturers to develop doors that were easy enough to open from within should infants become trapped, but also tightly enough closed that infants could not easily open them from outside. Manufacturers not only developed the necessary technology, but have reduced their costs in doing so. To our knowledge, no infant has died in a refrigerator equipped with the new technology. Interview with Robert Poth, Director, Division of Regulatory Management, Bureau of Compliance, Consumer Product Safety Commission, in Washington, D.C. (Sept. 29, 1983).

Second, hazards which can not be averted by regulation are not necessarily susceptible to reduction through the use of information and education. *See infra* section III.

[7] S. BREYER, REGULATION AND ITS REFORM 61 (1982).

[8] The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (1982), provides the basic framework for agency rulemaking. The APA's informal rulemaking procedures, which most agencies

The popularity of persuasion campaigns, of course, says little about their effectiveness. While we do not challenge the value of all information and education programs, we suggest their popularity rests more on philosophical and ideological grounds than on solid empirical evidence supporting their ability to alter consumer behavior. We question the efficacy of many education campaigns currently under way, especially those undertaken by health and safety agencies.

In this Article, we explore some of the myths surrounding information and education programs. We suggest that if they are to produce even modest changes in consumer behavior, many of these programs require more careful planning, larger expenditures and longer implementation periods than they usually receive. To illustrate our point, we examine in some detail three recent health and safety education campaigns—one promoting safety belt use,[9] one advancing burn prevention measures[10] and one urging lifestyle changes to combat heart disease[11]—which we believe underline the difficulties facing even the most skilled attempts to promote behavioral change through the use of information and education techniques.

In choosing these campaigns, we sought "exceptional" programs. The programs described herein purported to incorporate "state of the art" persuasion techniques and contained sophisticated, detailed evaluation schemes, characteristics by no means common to all information and education programs. In two campaigns, the program results have been extensively evaluated. In the third, preliminary but, we believe, significant results have been obtained. Our analysis of these campaigns highlights some of the social, psychological, financial, and occasionally political, factors that affect and often impede the success of educational campaigns generally. We hope our analysis will convince government officials and other

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use today, require that the agency publish in the *Federal Register* a notice of proposed rulemaking describing the substance of the proposed regulation, allow a period of time for submission of public comments, and then publish a final rule along with a statement of the rule's basis and purpose. 5 U.S.C. § 553(b)-(c). Executive agencies also must prepare a preliminary and final Regulatory Impact Analysis demonstrating that the benefits of the proposed regulation outweigh its costs and that no less costly alternative exists. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 (1982). *See also* Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1982) (requiring agencies to prepare an analysis of the objectives of any proposed rule affecting "small entities," the need for such a rule, and the reasons why alternative actions were rejected). For a more complex set of rulemaking procedures expressly mandated by statute, see 15 U.S.C. § 2058 (1982) (outlining procedures for consumer product safety rules).

[9] *See infra* section II.A.

[10] *See infra* section II.B.

[11] *See infra* section II.C.

policymakers to undertake education campaigns with the same care and restraint currently accorded regulatory proceedings.

I. Changing Behavior Through Education

Any attempt to change consumer behavior must take into account the manifold complexities of the process of human persuasion. Health and safety education programs, moreover, differ in important respects from typical private sector "education," or advertising campaigns, and must overcome additional obstacles.

A. *Selling Safety vs. Selling Products*

The twentieth century, among its other distinctions, surely will be known as the age of mass communications. With the growth of print and electronic media has come the growth of a vast communications industry, including corps of mass "persuaders": propagandists, public relations specialists and the like.[12] Television, in particular, seems capable of deeply influencing the public.[13] Given the array of tools available, one might well suppose that little is beyond the capabilities of these persuaders, especially those seeking to promote public health and safety.

Unfortunately, a considerable body of research has cast doubt on the notion that mass persuasion techniques work very well in campaigns designed to alter public attitudes and behavior regarding health and safety concerns.[14] Indeed, one respected observer seems to doubt that these techniques work at all when employed to change deeply held attitudes and behavior patterns.[15]

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[12] *See generally* L. BOGART, STRATEGY IN ADVERTISING 2-11 (1967) (discussing the 20th century information explosion and the increasing complexity of modern society which requires increasing amounts of information). The 100 top national advertisers spent $17.1 billion for advertising in 1982, an increase of 15.2 percent from the preceding year. Elmquist, *100 Leaders parry recession with heavy spending*, ADVERTISING AGE, Sept. 8, 1983, at 1. Television and radio garnered $7.5 billion of these advertising dollars. *Id.* at 168.

[13] Television is a fixture in virtually every American household. Almost 78 million homes, or roughly 98 percent, have at least one television set. By the time a child graduates from high school, he or she will have spent more time in front of a television set (17,000 hours) than in a classroom (11,000 hours). From early childhood through the high school years, television viewing occupies more time than any activity other than sleeping. *See* L. Wallack, Television Programming, Advertising and the Prevention of Alcohol-Related Problems (1983) (paper presented at the conference to review the report, Alcohol and Public Policy: Beyond the Shadow of Prohibition, at National Academy of Sciences, Washington, D.C. (May 20-21, 1983)) and studies cited therein.

[14] *See* Cartwright, *Some Principles of Mass Persuasion: Selected Findings of Research on the Sale of United States War Bonds*, 2 HUM. REL. 253, 267 (1949); Etzioni, *Human Beings Are Not Very Easy To Change After All*, SAT. REV., June 3, 1972, at 45, 47; *See generally* Schramm, *The Nature of Communications between Humans*, in THE PROCESS AND EFFECTS OF MASS COMMUNICATION 1, 11 (2d ed. 1971), and references cited therein.

[15] *See* Etzioni, *supra* note 14, at 47 (expressing doubt that information campaigns work and noting that social scientists are reevaluating old assumptions that behavior patterns can be easily

Education Campaigns

It may sound paradoxical to suggest that techniques which seem to work so well in promoting products would operate so poorly in promoting safe behavior. The underlying premise of this proposition, however, proves to be misleading. It is true that mass persuasion techniques sell products, but they do so less easily than one might imagine. Merchandising and marketing remain more art than science, more intuition than reason. Advertising annals continue to be filled with instances in which companies devoted millions of dollars for market research, only to produce marketing duds.[16] For every dramatically successful ad campaign, there is at least one Edsel campaign.[17]

Moreover, the "social" marketing of health and safety requires a different approach than ordinary product merchandising. Safety tends not to have an inherent sales appeal.[18] While consumers will often avoid products they believe to be unsafe, they will rarely go out of their way to seek goods reputed to be particularly safe.[19]

Advertising for competitive products generally is aimed at persuading consumers to choose particular brands of the kinds of items they plan to buy anyway. It is less successful in convincing consumers to adopt new buying patterns.[20] Persuading consumers to purchase new types of products, or to change their behavior patterns in similarly significant ways, tends to be a costly and unpredictable process. Thus, spending millions of dollars to switch smokers from Camels to Kools may be profitable for the makers of Kools, because the underlying smoking habit already exists. In contrast, spending the same amount of money to convince smokers to abandon cigarettes is likely to produce only meager results.[21] Unfortunately, public education campaigns often attempt to break deeply fixed

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changed through education).

[16] *See generally* R. HARTLEY, MARKETING MISTAKES (1976) (discussing classic marketing mistakes).

[17] J. DEUTSCH, SELLING THE PEOPLE'S CADILLAC: THE EDSEL AND CORPORATE RESPONSIBILITY 33-79 (1976); R. HARTLEY, *supra* note 16, at 59-70 (both sources discussing background of Edsel marketing effort).

[18] Laner & Sell, *An Experiment on the Effect of Specially Designed Safety Posters*, 34 OCCUPATIONAL PSYCHOLOGY 34, 54 (1960).

[19] Two surveys — one of the advertising industry (1975), and the other of consumer outdoor garden equipment manufacturers (1977) — conducted by R. David Pittle while a Commissioner on the Consumer Product Safety Commission, revealed a long-established practice of not advertising the safety aspects of consumer products. This practice grew out of the view, strongly held both by manufacturers and by advertising agencies, that in general consumers do not make purchase decisions based on safety (notes on file with the *Yale Journal on Regulation*). In addition, research conducted by R. David Pittle, while on the faculty of Carnegie-Mellon University in 1972 (sponsored by National Science Foundation Grant GI-3277X), revealed that, when approximately 2000 consumers were questioned about factors they considered important in the product selection process, safety was found not to be a significant consideration.

[20] *See* M. MANDELL, ADVERTISING 161-62 (2d ed. 1974). *See generally* L. BOGART, *supra* note 12, at 61-68.

[21] *See* Etzioni, *supra* note 14, at 47.

consumer habits.

Ordinary product advertising is addressed to those consumers likely to be favorably disposed to the product. Unlike product advertising, government health and safety persuasion campaigns often seek to influence those least disposed to listen to their message.[22] Thus, many government campaigns are unsuccessful because they are targeted at individuals who are not receptive to the campaigns' messages. For example, simply convincing teenagers to avoid alcohol or drug abuse has turned out to be far more difficult than many researchers originally thought possible.[23]

Product marketers may find considerable profit in small market share increases which promoters of public information campaigns might consider not cost-effective. For example, a favorable shift of two or three percent in a product's market share might justify an expenditure of millions of dollars by a cosmetics manufacturer — indeed, many spend that much simply to maintain their market share.[24] On the other hand, most government agencies would think long and hard before trying to justify an expenditure of millions of dollars upon the expectation of so small a shift in consumer behavior.[25]

It is also important to note that government persuasion campaigns, particularly in the health and safety area, usually promote abstract "products" with rather intangible benefits, whereas product marketers sell concrete products with immediate, tangible benefits. Consumer reactions tend to be substantially weaker toward the former type of marketing.[26]

Of course, some of the differences between product merchandising and public information campaigns may seem to work to the advantage of the latter. Crest toothpaste, for example, has to compete with Colgate, Aim and Aquafresh for a consumer's attention. Anti-drug and pro-seatbelt campaigns would seem not to face comparable competing messages. Unfortunately, this is not the case. Public information messages, often in the form of television and radio public service announcements, do compete with one another both for air time and for the consumer's attention. They also compete with product advertising that is generally more appealing and exciting.[27] Favorable portrayals of drug use and risk-taking in movies and on television represent still more competition for health and safety messages. The extent to which these other messages undermine health and safety campaigns is not clear. But they do have an effect.[28]

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[22] Bloom & Novelli, *Problems and Challenges in Social Marketing*, 45 J. MKTG. 79, 81-82 (1981) (Social marketers often segment on the basis of risk to the consumer. They will target their efforts at drivers who tend to avoid using seatbelts, sexually active teenagers who tend to avoid using contraceptives, heavy smokers, etc.).

[23] Schmeling & Wotring, *Making Anti-Drug Abuse Advertising Work*, 20 J. ADVERTISING RESEARCH 33 (1980).

[24] Interview with Stan Cohen, Washington Editor, *Advertising Age*, in Washington, D.C. (Dec. 13, 1982). *See generally* L. BOGART, *supra* note 12, at 17 (promotion of established product represents continuing effort to maintain market position).

[25] We do not wish to imply that government agencies necessarily obtain large shifts in consumer behavior when they spend money on persuasion campaigns. Our point is that, when agencies justify large expenditures, they anticipate large shifts in behavior even if only small shifts are ultimately achieved.

[26] Yarwood & Enis, *Advertising and Publicity Programs in the Executive Branch of the National Government: Hustling or Helping the People?* 42 PUB. AD. REV. 37, 40 (1982).

B. *Creating Successful Information and Education Campaigns: Practice and Pitfalls*

Advertisers and market researchers have come to realize that the process of persuasion is extremely complex. For a persuasion campaign to succeed, consumers must: (i) receive and understand the message, (ii) agree with the message, and (iii) act in accordance with the message.[29]

1. *Transmitting Information Effectively*

Researchers have found that simply conveying a message so that it is widely received and understood can be exceedingly difficult. While this finding no doubt distresses advocates of information disclosure, considerable data suggest disclosure techniques, such as instructions and warning labels, do not work very well.[30] Advocates who rely on surveys indicating a strong consumer desire for safety warnings and nutrition labels[31] may be misled about the usefulness of these techniques. Studies have shown a significant discrepancy between the information consumers say they want and the degree to which consumers make use of such information. Consumers invariably indicate, when polled, a desire for information about product characteristics such as nutrition, quality and safety to guide their purchases.[32] Yet, studies show that consumers rarely seek this information from available sources.[33] In fact, there is evidence indicating that most consumers do not read such information when it is provided.[34]

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[27] Beals, Mazis, Salop & Staelin, *Consumer Search and Public Policy*, 8 J. CONSUMER RESEARCH 11, 21 (1981) ("[G]overnment agencies interested in altering consumer behavior through the provision of information must acknowledge that they are in competition with sellers for the attention of the consumer.").

[28] Schmeling & Wotring, *supra* note 23, at 36-37.

[29] We have divided the process of persuasion into three steps for analytical purposes only. These steps do not represent three distinct and separate phases in the persuasion process. *See* Schramm, *supra* note 14, at 36-41.

[30] *See* Jacoby, Chestnut & Silberman, *Consumer Use and Comprehension of Nutrition Information*, 4 J. CONSUMER RESEARCH 119 (1977). *See also* Dorvis & Purswell, *Warnings and Human Behavior: Implications for the Design of Product Warnings*, 1 J. PROD. LIAB. 25 (1977).

[31] Jacoby, Chestnut & Silberman, *supra* note 30, at 121.

[32] *Id.*

[33] *Id.*

[34] For example, in a newsletter of the U.S. Chamber of Commerce, a recent article criticizing

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Some of the reasons for the difficulty in transmitting "public service" information—including health and safety information—successfully seem easy to pinpoint. Anyone who has sorted through his or her daily "junk" mail, or dashed through a supermarket with barely a glance at price labels, let alone nutrition labels, knows that modern American society is flooded with "information," not all of which can easily be absorbed.

Furthermore, skillful and creative packaging of public service messages, which might make them more successful, is all too rare. As any viewer of late-night television knows, public service appeals often are inept, almost laughable. The "ineptness" factor is only one of a host of practical problems that plague most public service campaigns. In addition, information campaigns often suffer from poor media visibility due to message placement during low viewing times, overly vague and unspecific messages, unduly short campaign periods and a general failure to target audiences.[35]

In addition to these practical problems, researchers suggest an additional, more subtle reason why audiences do not receive information from information and education campaigns. Consumers often "filter" the information to which they are exposed. When a message conflicts with a person's prevailing cognitive structure, the message will be rejected or distorted to make it palatable.[36] In songwriter Paul Simon's words, "A man hears what he wants to hear and disregards the rest."[37]

2. *Changing Consumer Attitudes*

Once an information or education campaign message has successfully reached a consumer's consciousness, there remains the problem of convincing the individual of the merits of the message. The process of changing the attitudes of consumers who understand a message is itself enormously complex.

A central difficulty social marketers encounter is the tenuous relationship between increased knowledge and changes in attitude. A consumer's ability to recall the specifics of an information campaign does not neces-

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the FDA's proposal to require the inclusion of consumer information in prescription drug packages cited the case of a Minneapolis bank that mailed 120,000 pamphlets explaining its automated teller machine to customers. A special paragraph inserted into one hundred of the pamphlets offered $10 to anyone who read the paragraph and asked for the money. Not one customer took advantage of the offer. U.S. Chamber of Commerce, *FDA Reconsiders Patient Package Insert Program*, 3 WASHINGTON WATCH 12 (1981).

[35] *See* Schmeling & Wotring, *supra* note 23, at 34, and studies cited therein.

[36] *See* Cartwright, *supra* note 14, at 25. *See generally* E. JONES & H. GERARD, FOUNDATIONS OF SOCIAL PSYCHOLOGY 236-39 (1967).

[37] P. SIMON & A. GARFUNKEL, *The Boxer*, on BRIDGE OVER TROUBLED WATER side 2, track 1 (1969), *rereleased on* SIMON AND GARFUNKEL'S GREATEST HITS side 1, track 3 (1972).

sarily mean that the consumer agrees with the object of the campaign. Studies have shown, for example, that many smokers exposed to information about cigarette-related health problems fail to change their attitudes toward smoking.[38] Indeed, audience attitudes may actually harden against the information conveyed in public interest messages.[39]

These results are possible because messages do not simply flow in a linear fashion from the media to a passive, receptive audience. Instead, messages are transformed and redefined in various ways as they move into the public consciousness. For example, the widely recognized "opinion leader" phenomenon[40] affects the impact of information in significant, and often unpredictable, ways. Influential friends or family who amplify a message may cause other individuals to change their attitudes, while opinion leaders who criticize or ignore a message may completely undermine its impact.

The social class of audience members also seems to influence the extent to which messages affect consumer attitudes. Consumers in lower socioeconomic groups appear to be less influenced by information and education messages than are those in other groups. One study of childhood accidents, for example, has concluded that low-income parents demonstrate a "fatalistic" attitude toward their children's exposure to hazards.[41] This attitude often leads to the abdication of responsibility for reducing the children's exposure to risks; it also immunizes the parents against most forms of safety education.[42]

This difference in the relative receptivity of consumers in different social classes is particularly significant because many health and safety education campaigns are aimed at reducing hazards more commonly found among lower socioeconomic groups.[43] Campaigns designed to encourage vaccinations,[44] preventive dental care,[45] safe behavior with guns,[46] and seatbelt usage[47] have all foundered as they have reached out to these groups.[48]

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[38] *See* Staelin, *The Effects of Consumer Education on Consumer Product Safety Behavior*, 5 J. CONSUMER RESEARCH 30, 31 (1978).

[39] *See, e.g.*, Cooper & Jahoda, *The Evasion of Propaganda: How Prejudiced People Respond to Anti-Prejudice Propaganda*, in THE PROCESS AND EFFECTS OF MASS COMMUNICATION 282-99 (2d ed. 1971) ("Mr. Biggott" experiment, which provided literature opposing racial prejudice to prejudiced viewers, reinforced, rather than moderated, audience's views).

[40] This term was first used in 1948 by a group of researchers analyzing voter decisionmaking processes during the course of an election campaign. The researchers found that substantial numbers of voters relied not on the mass media but on the advice of friends and family — the "opinion leaders" — in deciding whom to vote for. *See* P. LAZARSFELD, B. BERELSON & H. GAUDET, THE PEOPLE'S CHOICE 49-51 (1948). Since then, social scientists have found the opinion leader phenomenon in virtually every aspect of consumer decision making. *See* Meyer, Maccoby & Farquhar, *The Role of Opinion Leadership in a Cardiovascular Health Education Campaign*, 1 COM. Y.B. 584-85 (1977) and references cited therein.

[41] Klein, *Societal Influences on Childhood Accidents*, 12 ACCIDENT ANALYSIS & PREVENTION 275, 276 (1980).

[42] *Id.*

[43] *Id.*

The recognition of the importance of social class, selective perception, opinion leaders and a host of other factors[49] has led social scientists to reevaluate the process of communication.[50] During the last forty years, most researchers have gradually abandoned the notion that communications reach a passive, homogeneous audience and have developed instead a model in which messages are received by highly active, highly selective audiences which manifest widely varying reactions.[51] The complex nature of audiences thus requires that educators who seek to change attitudes employ extremely sophisticated communication methods.

3. *Translating Changed Attitudes Into Modified Behavior*

Although it seems logical that changed consumer attitudes should translate easily into changed behavior, the relationship between changed attitudes and behavior is, in fact, not well understood. At least in the health and safety area, the difficulties that educators face in persuading consumers to change their attitudes appear with equal, if not greater, force in attempts to motivate consumers who agree with messages to do something about them.

In the health and safety area, a number of studies evaluating the link between attitude changes and subsequent behavior provide little encouragement to the advocates of information and education programs.[52] For example, in one recent study,[53] an experimental group of mothers received intensive training on home safety practices while a control group received no training. The experimental group indicated that the training had convinced them to improve the safety of their homes and had led them to do so. Surprisingly, however, members of the experimental group demonstrated no safer behavior than did the control group when researchers made unannounced visits to their homes.[54]

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[44] Hingson, *Obtaining Optimal Attendance At Mass Immunization Programs*, 89 HEALTH SERVICES REP. 53, 54 (1974) ("receiving of immunizations is related to various measures of socioeconomic status").

[45] Gelb & Gilly, *The Effect of Promotional Techniques on Purchase of Preventive Dental Care*, 6 J. CONSUMER RESEARCH 305, 307 (1979).

[46] Klein, Reizen, Van Amburg & Walker, *Some Social Characteristics of Young Gunshot Fatalities*, 10 ACCIDENT ANALYSIS & PREVENTION 177 (1978).

[47] Waller & Hall, *Literacy — A Human Factor in Driving Performance*, ACCIDENT CAUSATION, 1980, at 15.

[48] The difficulties education campaigns have in reaching the poor pose a dilemma for those who set public policies. Many opponents of product regulation believe that by raising product prices such regulation harms the poor. To the extent that information and education campaigns fail to adequately reach the poor, however, those who oppose product regulation and seek to aid the poor cannot advocate information and education as a meaningful alternative.

[49] *See* J. KLAPPER, THE EFFECTS OF MASS COMMUNICATIONS 3-4 (1960) (listing many factors that affect the flow of a message from the sender to the consumer).

[50] *Id.*

[51] *See* Schramm, *supra* note 14, at 6-12.

[52] It should be noted that evaluation studies remain the exception rather than the rule in health and safety education efforts. One marketing expert cites several possible reasons for the lack of evaluation research: (i) many education programs are designed and initiated by "action-oriented" individuals who approach these with the a priori view that education works and who thus see no need to document this belief, (ii) evaluation research requires complex, time consuming, and often expensive ex-

At times, the results of attitude changes can seem counterintuitive or even perverse. In another study, an experimental group of mothers exposed to messages advocating the postponement of toilet training claimed to have been persuaded by the messages. Subsequent interviews with the mothers indicated that their new views had persisted over time. Upon investigation, however, researchers found that the experimental group actually began toilet training their children at an earlier age than did the control group.[55] Similarly, industry foremen given an intensive two week training course which stressed the need to show considerate behavior toward factory workers scored significantly higher than a control group on questionnaires designed to elicit attitudes towards "consideration." Paradoxically, researchers found that foremen who had taken the course actually showed less considerate behavior than foremen who had never taken the course.[56]

Some researchers, reflecting on these results, have concluded that education campaigns simply cannot adequately address most public health and safety concerns.[57] Others, while remaining more optimistic, readily concede that the link between attitudes and behavior is complex,[58] and admit that changed attitudes provide no guarantee that behavior will be similarly changed.[59]

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perimental designs to control for a host of confounding and intervening variables and (iii) consumer behavior changed by education campaigns often takes a long time to manifest itself. Measuring the delayed effect of a campaign often requires extending the evaluation past the termination of most education campaigns. *See* Staelin, *supra* note 38, at 31. *See also* Festinger, *Behaviorial Support for Opinion Change*, 28 PUB. OPINION Q. 404 (1964) (noting the paucity of evaluation studies).

[53] Dershewitz & Williamson, *Prevention of Childhood Injuries: A Controlled Clinical Trial*, 67 AM. J. PUB. HEALTH 1148 (1977).

[54] *Id.*

[55] N. Maccoby, A. Romney, J. Adams & E. Maccoby, "Critical Periods" in Seeking and Accepting Information (1962), *discussed in* Festinger, *supra* note 52, at 409-410.

[56] E. Fleishmann, E. Harris & H. Borh, Leadership and Supervision in Industry: An Evaluation of a Supervisory Training Program, (1955) (Ohio State University, Bureau of Education Research), *discussed in* Festinger, *supra* note 52, at 410-11.

[57] *See* Dershewitz & Williamson, *supra* note 53, at 1148.

[58] *See* Staelin, *supra* note 38, at 31.

[59] *Id.*

4. *Maintaining Changed Behavior Over Time*

Some education campaigns, once effective, need not be repeated. A campaign to convince consumers to buy smoke detectors, for example, would seem successful if most consumers installed smoke detectors — a one time act.[60] Many health and safety hazards addressed by current education campaigns, however, do not lend themselves so readily to resolution by one time actions. Convincing consumers to wear seatbelts once or to avoid fatty foods for one day obviously would not reduce risks significantly.

Accordingly, in many instances, consumer educators not only must lead their audiences to change their behavior but must also motivate them to maintain the changed behavior over time. Regrettably, few consumer educators, especially those in government agencies, have looked at the long-term impacts of their programs.[61] Short budget cycles, sudden personnel shifts, and the inclination of agencies always to introduce new and different approaches to problems, doom many programs to short lives.[62]

Even programs committed to the long run face difficulties. One problem well known to product advertisers is "wearout."[63] That is, advertisements and advertising campaigns lose the ability to generate new or repeat sales over time as the public grows weary of the message. Product advertisers often are able to revive the appeal of their products by changing their messages. Presumably, consumer educators could do the same,[64] although the time and expense involved tend to discourage them from doing so. Unfortunately, as a consequence of the various forces which inhibit program longevity, most education campaigns generate few changes that survive them.[65]

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[60] Of course, battery operated detectors would require replacement cells from time to time. The replacement task, however, seems minor.

[61] Bloom & Novelli, *supra* note 22, at 82-83.

[62] *Id.*

[63] Axelrod, *Advertising Wearout*, 20 J. ADVERTISING RESEARCH 13 (1980) (noting that while repetition in advertising is beneficial, wearout phenomenon limits ability of commercials to generate new or repeat sales).

[64] The Swedish government adopted an interesting approach to avoiding "wearout" in its cigarette health warning program by requiring manufacturers to rotate required disclosure messages. *See* Maxis & Staelin, *Using Information Principles in Public Policymaking*, 1 J. MKTG. & PUB. POL'Y 3, 6 (1982).

[65] *See* Cousins, *The Effects of Public Education on Subjective Probability of Arrest for Impaired Driving: A Field Study*, 12 ACCIDENT ANALYSIS & PREVENTION 131, 137 (1980) (listing studies demonstrating the short-lived effects of campaigns — including those associated with passage of stiff legislation — directed against drunk driving). *See also* McNeill & Wilkie, *Public Policy and Consumer Information: Impact of the New Energy Labels*, 6 J. CONSUMER RESEARCH 1 (1979) (noting that, in response to the energy crises of the 1970s, "consumers have been asked to slow down, turn down, commute together, and generally adjust their energy consumption on a daily basis. However, in most cases, consumer behavior has gradually returned to pre-crisis norms.") One of the few campaigns to use "booster" techniques in years subsequent to the primary campaign is the British seatbelt campaign. From at least 1972 to 1979, the Ministry of Transport ran its ad campaign every year for about six weeks. According to a report by NHTSA, the British approach seems to have been quite

II. Three Case Studies

Each of the education campaigns described in this section incorporated many of the elements which must characterize successful information and education programs. Even so, each campaign has revealed the significant limitations of this approach. The NHTSA case study,[66] examined partly in its political context, suggests some of the political considerations that often motivate policymakers to undertake ineffective education campaigns. Project Burn Prevention[67] shows that even carefully crafted programs may be unable to overcome the inherent difficulties education campaigns confront. Finally, the Stanford Three Community heart disease program[68] demonstrates that even where local campaigns are successful it may be extremely difficult to operate such campaigns on a nationwide basis.

A. *Promoting Safety Belt Use*

The National Highway Traffic Safety Administration (NHTSA) recently began a three-year education campaign designed to increase safety belt use[69] in the United States.[70] This ongoing effort provides a useful context in which to examine the possibilities and limitations of education campaigns. Unlike previous U.S. safety belt campaigns, the current NHTSA program is national in scope[71] and contains a reliable and precise evaluation component.[72] Moreover, the agency claims to be committed to long-term implementation.[73]

Despite its apparent advantages over earlier campaigns, NHTSA's effort to date has produced only minimal gains in safety belt use. These preliminary results are not surprising given the ineffectiveness of past safety belt campaigns and the level of resources committed to the current effort.

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successful. OFFICE OF PROGRAM AND DEMONSTRATION, U.S. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, EFFECTIVENESS AND EFFICIENCY OF SAFETY BELT AND CHILD RESTRAINT USAGE PROGRAMS 29 (1982) [hereinafter cited as NHTSA SAFETY BELT EFFECTIVENESS REPORT], *reprinted in Small Car Safety Hearings*, *supra* note 5, at 332-449.

[66] *See infra* section II.A.

[67] *See infra* section II.B.

[68] *See infra* section II.C.

[69] We will use the terms "safety belt" and "seatbelt" interchangeably throughout this section.

[70] *See* NHTSA SAFETY BELT EFFECTIVENESS REPORT, *supra* note 65, at 88.

[71] The narrow geographic scope of most education programs conducted each year severely limits their effectiveness.

[72] *See infra* text accompanying notes 110 and 111.

[73] *See Hearings on Appropriations for 1983 Before the Subcommittee on the Department of Transportation and Related Agencies Appropriations of the House Committee on Appropriations*, 97th Cong., 2d Sess. 329, 457 (1982) (statement of Raymond Peck, Administrator) [hereinafter cited as *Appropriations Hearings*].

1. *The Problem: Highway Carnage and Low Seatbelt Usage*

Motor vehicles, for all their usefulness, claim more lives and produce more injuries than any other consumer product in the United States. Each year, 34,000 people are killed and more than half a million receive moderate to severe injuries as a result of highway accidents.[74]

According to NHTSA estimates, if *all* occupants wore seatbelts, motor vehicle fatalities could be cut in half, injuries could be reduced by sixty-five percent, and billions of dollars in lost economic output and medical bills could be saved.[75] Yet, only a fraction of American drivers and passengers—about 11.3 percent both in 1981 and 1982—regularly wear seatbelts.[76]

Low seatbelt use is by no means a new problem in this country. Since 1967, when the Department of Transportation (DOT) first required automakers to install seatbelts in all passenger cars,[77] NHTSA has tried to persuade, cajole, and sometimes compel consumers to wear seatbelts. For example, when it had become obvious that only a small fraction of consumers was wearing seatbelts, DOT, in 1972, issued a rule requiring auto manufacturers to install lap and shoulder belts in all 1974 models, along with an ignition interlock system that prevented engine ignition if the belts were not connected.[78] Public outcry against the interlock system led Congress to order DOT to rescind the interlock requirement.[79]

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[74] NHTSA SAFETY BELT EFFECTIVENESS REPORT, *supra* note 65, at 1.

[75] NHTSA bases these conclusions on its estimate that 180 lives would be saved and 3,400 serious injuries avoided for every one percent increase in seatbelt use. *Id.* at xi. *Cf. Appropriations Hearings, supra* note 73, at 382 (Administrator Peck stated that 172 lives could be saved for every one percent increase in safety belt use but did not say whether NHTSA had dropped its earlier estimate of 180). The General Accounting Office (GAO), however, has questioned NHTSA's calculation of the marginal effectiveness of changes in seatbelt use rates:

> Several experts outside the Federal Government whom we contacted . . . agreed with DOT that if *all* people not now wearing their safety belts (about 90 percent of the population) were convinced to do so—*on the average*—each one percent point increase would save 180 lives and prevent 3400 serious injuries. However, these experts said that the individuals comprising the first percentage point increase would probably be the most concerned with their personal safety and therefore less likely to be involved in accidents causing fatalities and serious injuries.

COMPTROLLER GENERAL OF THE UNITED STATES, GOVERNMENT ACCOUNTING OFFICE, STATUS OF THE DEPARTMENT OF TRANSPORTATION'S SAFETY BELT PROGRAM 86 (1983) [hereinafter cited as GAO REPORT].

[76] *See* OFFICE OF DRIVER AND PEDESTRIAN RESEARCH, RESEARCH AND DEVELOPMENT DIVISION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, RESTRAINT SYSTEM USAGE IN THE TRAFFIC POPULATION 3 (1983) (research notes) [hereinafter cited as RESTRAINT SYSTEM USAGE REPORT].

[77] Federal Motor Vehicle Safety Standard 208—Seatbelt Installation—Passenger Cars, 32 Fed. Reg. 2408 (1967) (current version at 49 C.F.R. § 571.208 (1982)). See State Farm Mut. Auto. Ins. Co. v. Dep't. of Transp., 680 F.2d 206, 209-213 (D.C. Cir. 1982), *vacated and remanded sub nom.* Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S.Ct. 2856 (1983), for a detailed history of seatbelt regulation.

[78] 37 Fed. Reg. 3911 (1972) (current version at 49 C.F.R. § 571.208 (1982)).

[79] *See generally* Robertson, *The Great Seatbelt Campaign Flop*, 26 J. COM. 41, 43 (1976).

Education Campaigns

Although the fact is often overlooked, NHTSA issued the 1972 rule as a first step toward its broader goal of "complete passive protection."[79] To realize this goal, NHTSA issued a new standard ordering manufacturers to install either automatic seatbelts or airbags in all cars sold in the United States.[81] This "passive restraint rule" would be phased in by 1984.

Less than a year after Ronald Reagan became President, NHTSA dramatically shifted gears and revoked its passive restraint rule.[82] In rescinding the standard, NHTSA indicated its intention to undertake a major educational effort to increase voluntary seatbelt use.[83] The agency claimed that the education campaign would be more successful and less expensive than the passive restraint rule.[84] NHTSA predicted that its education campaign would more than double safety belt use rates—from about eleven percent to at least twenty-five percent[85]—with a corresponding decrease in annual highway fatalities of 3,000 to 5,000.[86] In sharp contrast, the agency estimated that the rescinded passive restraint rule would have increased use by a mere four to five percentage points while saving only 688 to 860 lives per year.[87]

Insurance and consumer groups successfully challenged the rescission of the passive restraint standard, leading the Supreme Court to order NHTSA to reassess its decision.[88] Despite the Court's ruling and severe

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80. *See* Amendment of Federal Motor Vehicle Safety Standard 208, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (1974) (current version at 15 U.S.C. § 1410(b) (1982)). *See also* Robertson, *supra* note 79, at 43.

81. 42 Fed. Reg. 24,289 (1977) (current version at 49 C.F.R. § 571.208 (1982)) (modified standard 208).

82. 46 Fed. Reg. 53,419 (1981).

83. *Id.* at 53,425.

84. *See Appropriations Hearings*, *supra* note 73, at 382.

85. *See* Letter from Raymond Peck, Administrator, NHTSA, to the Honorable William Lehman, Chairman, Subcommittee on Appropriations, U.S. House of Representatives (March 2, 1983) [hereinafter cited as Peck Letter]. Administrator Peck estimated that "the aggregate effect of the programs now planned should result in statistically valid measurement of national usage rates in the range of 25 percent in the next three years." *But cf. Small Car Safety Hearings*, *supra* note 5, at 330-331, where Administrator Peck predicted that NHTSA's education campaign would achieve at least 35 percent use rates.

86. NHTSA's prediction is based on its estimate that 180 lives would be saved for every one percent increase in safety belt use. *See* NHTSA SAFETY BELT EFFECTIVENESS REPORT, *supra* note 65, at xi.

87. *See Appropriations Hearings*, *supra* note 73, at 329, 392. NHTSA estimated that, under the passive restraints rule, manufacturers would have chosen to install detachable automatic safety belts rather than airbags 99 percent of the time. The agency assumed that most people would then detach their passive belts. This analysis represents a complete reversal of NHTSA's view under the Carter Administration, when it estimated that passive restraints would save 9,000 lives and avoid 65,000 serious injuries each year, at a cost to consumers of about $25 per car (plus operating costs) for automatic safety belts and $112 per car (plus operating costs) for air bags. *See* UNITED STATES REGULATORY COUNCIL, THE AUTOMOBILE CALENDAR: RECENT AND PENDING FEDERAL ACTIVITIES AFFECTING MOTOR VEHICLES 242-47 (1981) [hereinafter cited as AUTOMOBILE CALENDAR].

88. Motor Vehicle Mfr. Ass'n. v. State Farm Mut. Auto. Ins. Co., 103 S.Ct. 2856 (1983).

congressional criticism, NHTSA continues to give its seatbelt education campaign high priority.[89]

2. *The Safety Belt Campaign*

The current NHTSA safety belt campaign was designed against a background of other campaigns that failed to achieve significant gains in seatbelt use. NHTSA claims that its program will not repeat these failures.

a. *Previous Campaigns*

Before initiating the current seatbelt campaign, NHTSA reviewed over 160 studies of past efforts to promote safety belt use. With few exceptions, these studies showed that seatbelt promotion campaigns produced negligible results.[90] Nevertheless, NHTSA concluded that Americans still might be persuaded to use seatbelts.[91] From past studies, the agency noted that consumers are reluctant to wear seatbelts because of their perceived inconvenience, fear of entrapment during an accident, and plain forgetfulness. The studies also demonstrated that consumers would probably wear seatbelts more often if they knew the true probability and consequences of being in an accident, understood the safety value of seatbelts, and developed the habit of wearing seatbelts at an early age.[92]

In the course of its review of previous educational efforts, NHTSA studied both American and foreign campaigns.[93] Only one American campaign was linked to a substantial increase in safety belt use, and this effort relied on self-reporting by consumers—a generally unreliable measurement technique.[94] However, foreign campaigns, most notably those conducted in Great Britain and Sweden, showed more encouraging results—often raising rates into the twenty to thirty-five percent range.[95] Based, in part, on the reported success of foreign campaigns, NHTSA initially predicted that a "sufficiently powerful" education effort could lead to seatbelt use rates of at least thirty-five percent.[96] Only after receiving intense congressional questioning[97] did the agency lower its estimate to twenty-five percent.[98]

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[89] *See generally Appropriations Hearings*, *supra* note 73; *Small Car Safety Hearings*, *supra* note 5.

[90] *See* NHTSA Safety Belt Effectiveness Report, *supra* note 65, at 28-39, for a discussion of the limited impact of past seatbelt promotion campaigns.

[91] *Id.* at 27; *See also Appropriations Hearings*, *supra* note 73, at 382.

[92] NHTSA Safety Belt Effectiveness Report, *supra* note 65, at 23.

[93] *Id.* at 28-39.

[94] *See id.* at 35-36. Self-reported usage in this program rose from 29 to 41 percent. However, a follow-up campaign, in which usage rates were actually observed, demonstrated a starting rate of only 12.4 percent and a final rate of only 16.8 percent.

[95] *Id.* at 29-34. Note, however, that much of the reported success of foreign campaigns was only temporary. *Id.* at 28. Virtually every nation studied, including Great Britain, went on to enact mandatory safety belt legislation. In other words, in most countries the primary effect of safety belt campaigns seems to have been to create public support for compulsory seatbelt laws. *Id.* at 33. *See also infra* notes 118-20.

b. *NHTSA's "New" Approach*

The failure of past American safety belt campaigns, which used only mass media techniques, led NHTSA to conclude that mass media campaigns alone are not powerful enough to induce significant changes in consumer behavior.[99] As a result, NHTSA designed a campaign which combines mass media tactics with education and incentive programs, and private mandatory use requirements.[100]

Education: NHTSA has strongly criticized previous seatbelt campaigns for their failure to include educational components.[101] According to the agency, simple mass media programs convey only brief messages to many potential targets, while education campaigns—through lectures, group sessions, movies, school projects, study lessons, brochures, and the like—can transmit longer, more informative, and more persuasive messages to small, carefully targeted audiences.[102] Thus, NHTSA has promoted its message through a process it terms "networking," which involves the use of national organizations to convey messages to their members. The agency has contacted or plans to contact educational, health, medical, civic, safety, business, government, military, insurance, law enforcement, and media groups.[103]

Despite the agency's enthusiasm for the education element of its program, none of the education studies cited by NHTSA demonstrated any greater success in promoting seatbelt use than the mass media campaigns reviewed by the agency. NHTSA argues that its program will succeed where others failed because the combination of mass media and education components will create a synergistic effect that was absent from past efforts.[104]

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[96] *Id.* at xi, 27. Interestingly, in reaching this conclusion NHTSA relied heavily on a number of studies done in the mid-1970s and virtually ignored a more recent 1978 study by Peter D. Hart Research Associates, which reached a far more pessimistic conclusion:

> The majority [of consumers] rarely use seatbelts . . . . There are few signs here that this situation will change. Even though the vast majority of Americans express considerable concern about auto accidents . . . nonetheless they decide not to use seatbelts. Nor is there any sign of increasing seatbelt use among the young. . . .

Peter D. Hart Research Associates, Public Attitudes Toward Passive Restraint Systems (1978) (report prepared for NHTSA), reprinted in National Highway Traffic Safety Administration, U.S. Department of Transportation, for the Special Committee to Study Methods for Increasing Use of Safety Belts, Transportation Research Board, Review of Programs Designed to Encourage Use of Safety Belts 61 (1979).

[97] *See generally Appropriations Hearings*, *supra* note 73.

[98] *See* Peck Letter, *supra* note 85.

[99] NHTSA Safety Belt Effectiveness Report, *supra* note 65, at ix, 28.

[100] *See id.* at 88.

[101] *See id.* at 40.

[102] *Id.* at 39.

[103] *Id.* at 88-90.

Incentives: In its *Safety Belt Effectiveness Report*, NHTSA noted that incentives and rewards are the primary means used by psychological researchers and practitioners to induce desired behavioral changes. Yet, according to the agency, these means have been "virtually absent" from efforts to promote seatbelt use.[105] Consequently, NHTSA has sought to create an incentive structure that rewards individuals who wear seatbelts and organizations that promote seatbelt use. The agency, for example, has lobbied insurance companies to offer favorable insurance rates to their customers who wear seatbelts.[106]

Use Requirements: NHTSA's plan to encourage private and public employers to adopt mandatory use requirements rounds out the agency's new approach. According to NHTSA, safety belt use has risen to as much as 50-90 percent where employers have required their employees to wear safety belts on the job.[107] Of course, the success of these policies depends on the employer's ability and willingness to enforce them,[108] both of which may be limited.[109]

3. *Results*

Over the past two years, NHTSA has monitored the program's results in nineteen U.S. cities and at roughly fifty sites within each city.[110] The most recent report from the agency's nineteen-city survey shows that estimated national seatbelt use has increased from 11.3 to 13.9 percent—2.6 percentage points.[111] Applying the agency's formula of 180 lives saved for every percentage point increase in safety belt use, the current campaign has saved roughly 936 lives during its first two years.[112] Depending on one's assumptions, the cost-benefit ratio of these results could vary widely. Nonetheless, because of the exceptionally high costs of highway tragedies, the program may still have been cost-beneficial.[113] Other approaches to auto safety, however, may also be cost-beneficial and arguably are more cost-effective.[114]

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[104] *Id.* at 88-93.

[105] *Id.* at 51.

[106] According to NHTSA, nearly 90 percent of those asked say that they would wear seatbelts if they would receive reduced insurance premiums. *Id.* at 52. However, insurance companies have been reluctant to endorse this type of incentive because of the difficulty of verifying that policyholders are actually wearing their seatbelts. *Id.*

[107] *Id.* at 58-62.

[108] For example, strict enforcement of belt policies has led to high use rates on military bases. *Id.* at 60.

[109] *See generally* Insurance Institute for Highway Safety, Problems with Company Belt-Use Approach, (August 5, 1981) (status report).

[110] *See* RESTRAINT SYSTEM USAGE REPORT, *supra* note 76, at 3. *See also Appropriations Hearings*, *supra* note 73, at 460.

[111] *See* OFFICE OF DRIVER & PEDESTRIAN RESEARCH, U.S. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, SAFETY BELT AND CHILD SAFETY SEAT USE DATA: OCTOBER, 1983 - DECEMBER, 1983 (1984).

4. *Comments*

Although the current NHTSA campaign employs more sophisticated techniques than previous campaigns,[115] the agency's program seems unlikely to achieve anything near its goal of twenty-five percent safety belt use by the end of 1984. The modest results of NHTSA's education campaign to date indicate that it is destined to repeat earlier failures.[116]

NHTSA believes its mass media, education, incentive, and private mandatory use programs provide a powerful combination that will make its new seatbelt campaign the most successful in American history.[117] The agency grounds its optimism on the reported success of seatbelt education campaigns conducted in other countries.[118] But more often than not, the apparent success of such campaigns was only temporary and was achieved at a very high cost.[119] Foreign campaigns have been more successful in creating public attitudes in favor of mandatory use laws than in achieving permanent gains in seatbelt use.[120]

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[112] The GAO's analysis, *supra* note 75, at 86, indicates that these estimates may be exaggerated because safer drivers—i.e., those that have fewer accidents in any case—are the ones most likely to respond to a seatbelt campaign. NHTSA's predictions may also be overly optimistic in assuming that increases in seatbelt use will be permanent. Previous studies show that the increases in seatbelt use from education campaigns are usually quite temporary. *See supra* note 95.

[113] At the risk of oversimplifying, if one assumes, as NHTSA does, that 180 lives are saved and 3400 injuries avoided with every percentage point increase in seatbelt use, *see supra* note 75, then the 2.6 percent increase over two years has saved at least 936 lives and avoided 17,680 serious injuries. Given annual program costs of $3.23 million, the cost per life saved has been $6,902 and the cost per injury avoided $365. If one uses the GAO's estimate of $27 million for the cost of the program, the cost per life saved increases to $19,231 and the cost per injury avoided jumps to $1,018. Even these figures yield positive net benefits given NHTSA's assumption that each life saved produces benefits of $265,000 and each injury avoided produces $9,400 in benefits.

We should note that these computations address only NHTSA's costs for the campaign, not total social costs. For example, NHTSA claims that many private sector groups have contributed advertisements and other resources to the campaign. In a strict cost-benefit analysis, these costs would also have to be included, as would such items as consumer inconvenience (buckle-up costs). We have not attempted to calculate these indirect costs.

[114] We do not propose to review the extensive literature on the costs and benefits of passive restraint requirements. Suffice it to say that we believe a passive restraint rule that excludes the detachable belts option would likely be cost-beneficial. The key point is that merely because the education campaign may produce positive net benefits to society does not mean that it will be more effective than other regulatory approaches. *See, e.g.*, AUTOMOBILE CALENDAR, *supra* note 87, at 242-247. This report, compiled near the end of the Carter Administration, demonstrates that until 1981 NHTSA strongly favored its passive restraint requirements. The *Automobile Calendar* also surveyed other NHTSA proposals for improving auto safety, including promotion of state safety belt laws, crashworthiness ratings, and general design requirements.

[115] *See Appropriations Hearings, supra* note 73, at 456-57.

[116] *See supra* note 90.

[117] *Appropriations Hearings, supra* note 73, at 456-57.

[118] NHTSA cited seatbelt campaigns in Great Britain and Sweden as evidence of the potential for the success of a true education program. NHTSA SAFETY BELT EFFECTIVENESS REPORT, *supra*

In addition, the campaign is insufficiently comprehensive to overcome ingrained behavior patterns regarding safety belt use. Notwithstanding NHTSA's optimism about its ability to change negative attitudes toward seatbelt use, it has not realized that the establishment of favorable attitudes toward a product like safety belts is often not enough to overcome firmly entrenched behavior patterns—in this case the longstanding refusal to wear seatbelts.[121]

Solid and regular reinforcement is needed to increase seatbelt use and maintain such gains. Yet, little in NHTSA's education campaign suggests that the agency will be able to invest the resources and time necessary to achieve permanent increases in seatbelt use. First of all, although NHTSA's campaign is a high-cost one by American standards, the agency's commitment is quite modest when compared on a per capita basis with a program like that of Great Britain.[122] Second, if the agency expects to achieve long-term gains, it must adopt, or be allowed to adopt, a truly long-term perspective. Changing the patterns of seatbelt use in the absence of compulsory laws is, at best, likely to be a decade-long project, not a three-year program. Yet, a comparison of the modest results to date with the agency's initial projections suggests that NHTSA will find it difficult to muster the political support necessary to continue the program long enough to achieve permanent gains in safety belt use. Finally, we suspect that the cost of an adequately comprehensive seatbelt campaign could prove to be so high that the program would be much less cost-effective than other regulatory options for reducing highway fatalities.[123]

note 65, at 29-32. Britain spent $2.5 million per year for 10 years on a mass media campaign promoting seatbelt use. During this time, usage rates increased from 12 to 33 percent. Sweden conducted a series of combined mass media and education programs from 1971-1974, which increased usage rates from 15 to 36 percent. *Id.*

[119] *Id.* at 28-29. On a per capita basis, a campaign as extensive as the British effort could cost as much as $10 million per year to reproduce in the United States—more than three times the $3.23 million per year that NHTSA claims to be spending on its current campaign.

[120] Notwithstanding the alleged success of its mass media campaign, Great Britain enacted a compulsory seatbelt law in August 1981. Sweden enacted its compulsory seatbelt law in 1975, only a year after its seemingly successful seatbelt program was completed. See Hakkert, Zaidel & Sarelle, *Patterns of Safety Belt Usage Following Introduction of a Safety Belt Law*, 13 ACCIDENT ANALYSIS & PREVENTION 65 (1981), for a list of other countries that have passed compulsory seatbelt laws.

[121] *See supra* text accompanying notes 48-54.

[122] *See supra* note 119.

[123] *See supra* note 114.

B. *Reducing Burn Injuries*

Project Burn Prevention, like the NHTSA safety belt campaign, provides several insights into the way government agencies employ education campaigns. The program was more generously funded and more carefully developed than most education campaigns. Its creators included in it a detailed, comprehensive evaluation component and monitored the project closely. At the same time, Project Burn Prevention, like many campaigns, included only a brief implementation period. Despite its many positive attributes, the program ultimately failed to generate measurable changes in consumer behavior.

1. *The Problem: Excessive Fire Deaths and Injuries*

The United States shares with Canada the dubious distinction of having the highest fire death rate in the world.[124] In the United States, fire is the fourth leading cause of accidental death, and the second leading cause of accidental death in the home.[125] Fire causes almost 5,000 residential fatalities and over 21,000 injuries annually.[126] Most victims of fire in the home are the very young and the elderly.[127]

In response to national concern about fire safety, the newly-created Consumer Product Safety Commission (CPSC) in 1974 commissioned a consortium of Massachusetts institutions to develop a consumer education program to promote burn injury prevention.[128] The one million dollar project eventually stretched over four years.[129] The CPSC decided upon an education program in this area, in part, because some expert opinion held that education could address aspects of the burn problem not susceptible to other means of remedy.[130] Project Burn Prevention tested this opinion, because it sought not only to measure changes in consumer attitudes and knowledge, but also to measure changes in behavior—as reflected in reductions in the burn injury rate—resulting from the program.[131]

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[124] GEORGIA INSTITUTE OF TECHNOLOGY, SELECTED INTERNATIONAL COMPARISONS OF FIRE LOSS: 1975-1978 (1980) (report prepared for U.S. Fire Administration).

[125] NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 80 (1983).

[126] National Fire Protection Association, *Fire Loss in the United States During 1982*, FIRE JOURNAL, September 1983.

[127] ACCIDENT FACTS, *supra* note 125, at 80.

[128] The Massachusetts General Hospital, one of the world's most respected teaching hospitals, assumed financial and contractual responsibility for the project. The Shriners Burns Institute, a pediatric intensive burn unit, provided project direction, technical assistance for implementation, and evaluation of the program's impact on burn injury rates. The Education Development Center, a nonprofit educational research and development firm, produced the educational diagnosis, developed educational materials, and evaluated changes in knowledge and attitudes among those participating in the program. In addition, faculty at the Harvard School of Public Health and the Harvard Graduate School of Education provided assistance in experimental design and data analysis. E. MCLOUGHLIN, C. VINCE, A. LEE, A. MACKAY, J. HALPERN & J. CRAWFORD, PROJECT BURN PREVENTION FINAL REPORT: THE EFFECTS OF AN EXPERIMENTAL PUBLIC EDUCATION PROGRAM ON KNOWLEDGE, ATTITUDES, AND BURN INJURY RATES 1975-1980 5 (1980) (report prepared for U.S. Consumer Product Safety Commission) [hereinafter cited as FINAL REPORT].

[129] The actual implementation period, however, lasted only eight months. *See infra* text accompanying notes 142-43.

2. *The Campaign*

Project Burn Prevention consisted of four phases: needs assessment, program development and establishment of burn incidence baseline data, program implementation, and evaluation and revision of program materials.[132]

In Phase I, the Project Burn Prevention researchers collected epidemiological data[133] to determine the distribution, according to age and sex, of burn injury victims,[134] relative frequency of different types of burn injuries,[135] relative severity of different types of burn injuries,[136] and the distribution by age of victims of different types of burn injuries.[137] The researchers used this data to relate burn injury patterns among different population groups to their knowledge about burn injury and its prevention.[138] Researchers concluded that the campaign should focus on scald burns, because of their high frequency, and on flame burns, because of their extreme severity.[139]

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[130] *See* FINAL REPORT, *supra* note 128, at 4-5.

[131] In this respect, Project Burn Prevention went beyond the other programs discussed in this Article. In its seatbelt campaign, for example, NHTSA is studying use rates, not reductions in death and injury. NHTSA claims an intention to measure reductions in death and injury at some future point. *See* OFFICE OF OCCUPANT PROTECTION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, EVALUATION PLAN 1 (1983).

[132] *See* FINAL REPORT, *supra* note 128, at vii.

[133] The burn injury data came from burn reports received under a mandatory reporting system run by the Massachusetts Department of Public Health. *See* C. HEALER, E. MCLOUGHLIN & V. GUILROY, BURN INJURIES: CAUSES, CONSEQUENCES, KNOWLEDGE, BEHAVIORS, pt. 1, 3-4 (1976) (report prepared for U.S. Consumer Product Safety Commission) [hereinafter cited as BURN INJURY REPORT].

[134] *Id.* at pt. 1, 6 (finding that the very young have the greatest risk of burn injury).

[135] *See id.* at pt. 1, 9. Scald burns represented the most common type of burn reported (44 percent). Next were flame burns (27 percent), contact burns (13 percent), radiation burns (sunburn, sunlamps, etc.) (3 percent) and electrical burns (2 percent).

[136] *See id.* at pt. 1, 10 (noting flame burns inflict the most severe harm).

[137] *Id.* at pt. 1, 11.

[138] The researchers administered questionnaires to obtain data concerning the participants' levels of knowledge regarding burn hazards. To the researchers' distress, most people answered correctly only 35-50 percent of questions designed to elicit basic information. One item of special concern arose from the study: while parents of young children seemed to know a great deal about scalds, young children have the highest scald burn injury rate. This fact would seem to suggest that knowledge per se is not a complete solution to the problem. *Id.* at pt. 1, 13-17.

[139] *Id.* at pt. 1, 22. Some of the other more interesting conclusions: (i) while certain predominant themes should be emphasized in burn prevention education, care must be taken to address specific situations and age-related risks, rather than to broadcast vague generalizations and fear-provoking

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In Phase II, the Project Burn Prevention group developed informational and educational materials designed to address five occasionally overlapping audiences: (i) a general audience of all persons exposed to public information through the mass media, (ii) children in grades K-1, (iii) children in grades 2-3, (iv) high school students, and (v) members of certain civic, fraternal and educational groups—generally young adults and the parents and caretakers of young children—who could be reached through community education channels.[140]

The researchers developed a wide variety of materials targeted to the characteristics of different groups. The materials were designed to address specific, age-related risks and to avoid vague generalizations and fear-provoking messages. Materials ranged from thirty-second television public service announcements and an information booklet to reach the general public, to filmstrips and games for students, to lecture materials for civic and fraternal groups.[141]

Phase III of the four-year project consisted of an eight-month message implementation period, from October 1977 to May 1978.[142] Implementation varied across geographic communities as well as across population groups. For example, in the greater Boston standard metropolitan statistical area (SMSA) the group used only a mass media approach, which they supplemented in one community with a school education program. In another community, outside the Boston SMSA, the researchers used a community outreach program. These variations allowed the researchers to compare the effectiveness of different approaches. In the evaluation phase, Phase IV, the researchers performed three types of analysis. They analyzed comments by participants regarding the usefulness of the program; compared levels of knowledge among program participants with their baseline levels and with levels of knowledge among control population

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messages; (ii) burn safety messages should be age-appropriate and action-oriented. Measurable behavior change should be a primary goal; (iii) the educational campaign should aim to reach the broadest possible range of socioeconomic groups; (iv) burn injury risk groups should not be approached in isolation, but as interacting members of families. Messages addressed to each age group can be transmitted among family members; and (v) consumers tend to respond to messages that address ways they can protect other people, rather than themselves. People will often ignore precautions to keep themselves safe, yet will take great care to protect others. *Id.* at pt. 1, 24-27.

[140] *See* FINAL REPORT, *supra* note 128, at 11-13.

[141] For the public information campaign, the researchers developed four thirty-second television public service announcements, three printed posters and an information booklet. For the school program, the group developed cartoon books and films for grades K-1. The researchers used dramatic presentations, a story card series and filmstrips with suggested follow-up activities for grades 2-3. To reach high school students, the group developed films, audiocassettes, a student book, a simulation game, small group exercises, and structured discussion groups to focus on specific hazards—high tension wires, flammable liquids and risks to children in their care—relevant to teenagers. Finally, to promote fire safety through community outreach channels, the researchers developed lecture materials for civic, fraternal and educational organizations. *Id.*

[142] *See id.* at 7.

groups; and compared burn injury rates before, during and after the implementation period with burn injury rates in control communities.[143] The evaluation did not include any quantitative analysis of attitude changes.

3. *Results*

The detailed evaluation scheme adopted by the research group was intended to permit precise assessment of the effectiveness of the program components. Different persuasion techniques did indeed produce dissimilar effects. All participants, and especially those in the school programs, praised Project Burn Prevention and expressed a desire to use its educational materials in the future.[144] Increases in knowledge about burn hazards varied according to the setting and the materials used. The school education program proved successful, albeit by varying degrees, in increasing student knowledge about burn hazards.[145] To a lesser extent, the community outreach program also succeeded in increasing knowledge.[146] The public information campaign, however, with the possible exception of an information booklet, had no measurable effect on adults' knowledge of burn hazards.[147] Most significantly, statistical measurements of burn injuries among the participants—the key variable measured—did not show significant decreases in frequency or in severity.[148]

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[143] The Project Burn Prevention group strongly criticized previous fire prevention campaigns because they had "lacked a careful study design that would permit quantitative evaluation of the effectiveness of the program, both to change knowledge and to have an impact on injury rates." *Id.* at 4. Accordingly, the group made evaluation a "major undertaking" of their campaign. *Id.* at 54.

[144] *Id.*

[145] The education program proved more successful with elementary school students than with high school students, although the latter did achieve statistically significant increases in knowledge. At the conclusion of the program, for grades K-1, 54 percent more classrooms in the experimental site (Lynn) passed a written test on burn hazards than in the control site (Holyoke). *Id.* at 64. In grades 2-3, 68 percent more Lynn classrooms passed the test. *Id.* at 83. At the high school level (grades 10-12), only about 10 percent more classrooms in Lynn passed the test than did those in the control site. *Id.* The researchers attributed the superior performance among the lower grades to better cooperation from elementary school teachers than from their high school counterparts. *See id.* at 100-101.

[146] Although the community outreach program did not contain materials designed specifically for use in the schools, this program component produced its most significant results in the schools. Apparently, several teachers discovered the school materials in the public library in Quincy, the outreach community, and subsequently used them in their classrooms. Several youth organizations used them as well. Nineteen percent more grade K-1 classrooms in Quincy passed the written burn hazard test than did their counterparts in Holyoke, the control site. *Id.* at 64. For grade 2-3 classrooms, the comparable difference was 31 percent. *Id.* at 83. High school students in Quincy, however, demonstrated no significantly greater burn injury knowledge than their control site counterparts. *Id.* at 111. Adults questioned by telephone in the community outreach site, with the possible exception of those who had received the informational booklet, demonstrated no significantly greater knowledge than those questioned in the control site. *Id.* at 186-87.

[147] *Id.*

[148] *Id.* at ix.

4. *Comments*

Project Burn Prevention encountered problems that often plague education campaigns: message attenuation and limited duration. The messages conveyed by the project materials reached only a fraction of the total audience. Of that fraction, only a small portion were exposed to burn injury situations; yet a smaller portion remembered the program messages; fewer still—virtually none, according to the project results—were able to use their increased knowledge to avoid a burn injury.[149] Evidently, the implementation period (eight months) was insufficiently long to overcome the message attenuation. A longer implementation period would have increased the cost of the project, but might have been more effective in inducing behavioral change.

Two additional, methodological problems resulted from the relative infrequency of burn injuries. During its brief implementation period, Project Burn Prevention in effect had to compete with random fluctuations in the burn rate if it was to demonstrate significant results.[150] The Project Burn Prevention messages would have had to be extremely powerful and persuasive to overcome the effect of random chance on the burn rate over such a short period. It is hardly surprising that the program was unable to generate statistically significant results under these conditions. Moreover, the project researchers, in a laudable attempt at precise measurement, probably developed and separately analyzed too many program components. The impact of each component was thereby diffused, and no single component could be shown to have produced a measurable impact.[151]

Notwithstanding the failure of Project Burn Prevention to generate measurable reductions in burn injury rates, the researchers argued that their results did not demonstrate the inadequacy of education programs. They concluded "[t]he study shows that participants learned important information about the prevention and emergency treatment of burn injuries. Recognizing the problem is the first step in an often long and arduous process of raising public consciousness about a problem to the point where public pressure builds to solve it."[152] This analysis, of course, does not speak to the effectiveness of education in reducing injuries. Rather, it reveals that, over time, education can promote attitudes that allow for the creation of effective regulatory solutions which do not require individual behavior modification.

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[149] The significance of message attenuation can be illustrated by a concrete example. If, at each of these four stages, the Project Burn Prevention program succeeded in reaching only one half of every 100 potential members of its audience, the number of people ultimately protected from injury because of the program would be approximately six. (100 x ½ x ½ x ½ x ½ = 6.25) *See id.* at 40.

[150] *See id.* at 41.

[151] *Id.* at ix.

[152] *Id.* at 56.

The Project Burn Prevention researchers themselves eventually reached this conclusion. In an article published two years after completion of the campaign, members of the research group acknowledged the limited effectiveness of education to promote safe behavior and thereby reduce the burn rate.[153] Education, in their view, could be used most effectively as part of a set of strategies to reduce burn injuries. Future education programs, they argued, should focus on "[c]reating a public attitude of willingness to accept those measures of passive protection that will reduce injuries and prolong life and good health."[154]

C. *Attacking Heart Disease*

The Stanford Three Community heart disease program described below is unusual insofar as it produced persuasive evidence that an education campaign using only mass media can modify consumer behavior. The substantial resources devoted to this small-scale study, however, suggest that successful national education programs may be far more costly than most policymakers believe.

1. *The Problem: Heart Disease and Life Style*

Heart disease is the leading cause of death in the United States.[155] Research has shown that cigarette smoking, elevated plasma cholesterol and hypertension increase the risk of heart disease.[156] Unfortunately, cigarette smoking, diets high in saturated fat and cholesterol, sedentary living habits and excess weight have proven severely resistant to change. Researchers have concluded that the habits influencing these cardiovascular risk factors often are reinforced by culture and custom.[157]

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[153] McLoughlin, Vince, Lee & Crawford, *Project Burn Prevention: Outcome and Implication*, 72 Am. J. Pub. Health 241, 246 (1982) (In general, passive measures that automatically protect the community from injuries are more effective in the prevention of injuries than active measures that depend on persistent behavior change.)

[154] *Id.*

[155] *See* Public Health Service, U.S. Department of Health, Education and Welfare, Healthy People: The Surgeon General's Report on Health Promotion and Disease Prevention 53-59 (1979) (in 1977, heart disease was responsible for over 700,000 deaths. Heart disease is also the greatest cause of permanent disability claims among workers under 65.) *See also* Maccoby, Farquhar, Wood & Alexander, *Reducing the Risk of Cardiovascular Disease: Effects of a Community-Based Campaign on Knowledge and Behavior*, 3 J. Community Health 100 (1977) (United States morbidity and mortality due to cardiovascular disease rank second highest, after Finland, among developed countries) [hereinafter cited as Community Health article].

[156] *See* Farquhar, Wood, Breitrose, Haskell, Meyer, Maccoby, Alexander, Brown, McAllister, Nash & Stern, *Community Education for Cardiovascular Health*, 1 Lancet 1192, 1192 (1977) [hereinafter cited as Lancet article].

[157] *Id.*

2. *The Campaign: The Stanford Three Community Study*

In 1972, two Stanford professors—one in the medical school and one in the school of communications—undertook to develop a heart disease education campaign. Mindful of past failed attempts in this area, the professors sought to employ new and more sophistocated techniques.[158] Federal grants of almost $4 million financed the five year project.[159]

The professors chose three California communities—Tracy, Gilroy and Watsonville—for the program. They selected Tracy as the control city because it is distant from and does not share broadcast channels with Gilroy and Watsonville. Gilroy and Watsonville share some television and radio channels, but each town has its own newspaper.[160]

Notwithstanding their view that other education campaigns using mass media had demonstrated little success,[161] the researchers adopted this approach as one of the major components of the program. They used the media to saturate residents of Gilroy and Watsonville with information about how and why to adopt lifestyle changes to reduce the risk of heart disease. The researchers acquired a substantial amount of free media space, and spent an additional $500,000 for advertisements.[162] This combination of free and paid media space permitted the researchers to produce substantial amounts of programming.[163] The researchers used a variety of printed matter, including posters placed in buses, stores and worksites, to supplement television advertising.[164] The program also incorporated a significant amount of material in Spanish to reach Spanish-speaking participants.

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[158] *Id.*

[159] *See* Beyers, *Can Health Habits Really Be Changed?* PRISM, May 1974, at 13.

[160] The three towns chosen were distinct communities, each with a population of about 15,000. None was a bedroom community for any other major city, nor did any of the communities chosen receive major television broadcasting from San Francisco, San Jose or any other major city. Beyers, *supra* note 159, at 13.

After selecting the communities, the professors gathered a research team which selected from each town a random sample of subjects between the ages of 35 and 59. The age distribution of the subjects was chosen to allow the campaign to operate on those individuals whose lifestyles could be altered before they reached the 60-70 year age bracket, where incidence of coronary disease is at its highest. *Id.*

The team administered to each subject a 400-item behavioral questionnaire designed to determine the level of knowledge of each subject and to identify the points at which each showed resistance to persuasion. One item in the questionnaire asked the participants to respond to the statement "Breakfast doesn't seem right without eggs." Thirty-five percent agreed. Thirty percent concurred with the statement, "It's practically impossible to cut down on smoking." Another item, "I have a hard time making myself get out and exercise," elicited agreement from 59 percent of those questioned. And 51 percent of the respondents believed that, "Sometimes, no matter what a person does, he gains weight." *Id.* at 15-17.

The researchers found a certain amount of ignorance in addition to resistance. For example, most respondents believed that pork contains more cholesterol than liver, when, in fact, pork is very low in cholesterol. *Id.* at 17.

The researchers also performed physical examinations which included measurements of each subject's plasma cholesterol, triglyceride concentrations, blood pressure and weight. These data were then used to develop a multiple logistic function of risk, based on the function developed in an earlier study, see Truett, Cornfield & Kannel, *A Multivariate Analysis of the Risk of Coronary Heart Disease in Framingham*, 20 J. CHRONIC DISEASE 511 (1967) (noted in Beyers, *supra* note 159, at 103), which yields a prediction of the probability that a subject will develop cardiovascular disease within a period of roughly 12 years. Individuals in the top risk quartile were chosen for special study. In Watsonville, a random subset of two-thirds of this high risk group (and their spouses) received face-to-face intensive instruction. The other high risk individuals served as controls.

[161] *See* LANCET article, *supra* note 156, at 1192.

Each participant received a basic booklet, *The Heart Of The Matter*, filled with facts about atherosclerosis and ways to prevent it, along with a 78-page family guide, *The Cook's Book*, containing recipes designed to reduce heart disease risk factors. Several researchers credited the program's success to the printed materials because they provided participants with specific guidance at critical points in their activities, such as meal times. Other forms of communication might not have reached participants when they were engaged in risk-enhancing activities.[165]

A distinctive and successful—but obviously expensive—feature of the Stanford program was its use of individualized behavior modification techniques on certain participants, called "intensive-instructees," chosen from among a high-risk group in Watsonville.[166] The techniques included an analysis of the behavior patterns of the participants and specially tailored programs to address the risk factors present in each participant's lifestyle. For example, smokers who were lean and had normal plasma cholesterol levels were given supplemental instruction about how to stop smoking, but not about dietary changes. Similarly, those who had elevated blood pressure levels were given special instruction in salt restriction and weight loss, while individuals with elevated levels of plasma lipids were given supplemental instruction in qualitative dietary changes.[167] Intensive-instructees and their spouses attended nine counseling sessions, each of which varied in length from one and one-half to three and one-half hours.[168]

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[162] *See* Tudge, *Preventive Medicine, California Style*, WORLD MED., July 27, 1977, at 17, 19.

[163] The researchers produced about three hours of television programming, 50 television spots, 100 radio spots, several hours of radio programming, weekly newspaper columns, and a number of newspaper advertisements. *Id.* at 19.

A typical 60-second TV spot showed a man sitting down before a plate of eggs, bacon and toast. He heavily salted the food. Then the plate suddenly disappeared. A narrator's voice intoned:

> The great American breakfast really sets you up for heart disease. Egg yolks are high in cholesterol. So are fatty meats, whole milk and butter. Too much sugar adds more risk of heart trouble, so try a few replacements: substitute fresh fruits, low-fat milk and soft margarine. You'll live longer — that's the heart of the matter.

Kiester, *An Entire Town is Conquering America's No. 1 Killer*, FAMILY HEALTH/TODAY'S HEALTH, November 1976, at 34, 36-37.

[164] *See* COMMUNITY HEALTH article, *supra* note 155, at 104.

[165] *See* Beyers, *supra* note 159, at 53.

[166] The behavior modification principles applied in the intensive-instruction program followed five general steps: (i) analysis of the participants' behavior, (ii) modeling of the new behaviors, (iii) guided practice in the new behaviors, (iv) artificial reinforcement from instructions in the new behaviors, and (v) maintenance of the new habits without artificial reinforcement. *See* COMMUNITY HEALTH article, *supra* note 155, at 104.

3. *Results*

According to the Stanford researchers, participants' knowledge about dietary factors affecting heart disease improved as the level of the education effort increased. In Tracy, the control town, increases in knowledge were minimal;[169] in Gilroy and Watsonville, knowledge increases were significant.[170] The greatest increases occurred among the Watsonville "intensive-instructees," but groups in Watsonville and Gilroy that received only mass media exposure also showed significant knowledge increases.[171] Interestingly, and contrary to the results of most other studies on the same point,[172] the Stanford researchers claimed "impressive" knowledge gains among the less-advantaged Spanish-speaking groups.[173]

The researchers tested for behavioral changes in two ways: (i) by monitoring changes reported by the participants in their diets, exercise and smoking habits, and (ii) by measuring physical changes such as weight and plasma cholesterol levels.[174]

Reported changes in diet generally tracked participants' levels of increased knowledge. For example, the intensive-instructees in Watsonville reported the greatest change—a sixty percent drop in daily egg consumption, whereas the Tracy control group showed only a nineteen percent drop.[175] These results were consistent with the reported decreases in overall cholesterol and saturated fat intake.[176]

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[167] *Id.*

[168] One observer described the meetings, typically led by Stanford graduate psychology students, as "part pep rally, part revival meeting, part church social and part health-and-hygiene class." Kiester, *supra* note 163, at 37.

[169] *See* COMMUNITY HEALTH article, *supra* note 155, at 108.

[170] *Id.*

[171] Scores in Tracy (control) at the end of the two year program rose 6.3 percent. In sharp contrast, scores in Gilroy (mass-media only) rose 26.5 percent; in Watsonville (mass-media plus intensive instruction) scores rose 40.8 percent. Researchers suspected the higher scores in Watsonville resulted from diffusion of information from the intensive-instructees to other Watsonville participants.

Among participants identified as *high-risk* persons, scores rose 5.2 percent in Tracy (control); 27.7 percent in Gilroy (mass media only); and 54.2 percent in Watsonville (mass media plus intensive instruction). *Id.* at 108.

[172] *See supra* text accompanying notes 40-47.

[173] *See* COMMUNITY HEALTH article, *supra* note 155, at 108.

[174] *Id.* at 109-113.

[175] *Id.* at 111.

[176] *See* Stern, Farquhar, Maccoby & Russell, *Results of a Two-Year Health Education Campaign on Dietary Behavior: The Stanford Three Community Study*, 54 CIRCULATION 826, 828-30 (1976) [hereinafter cited as CIRCULATION article].

More significant were the physiological changes measured by the researchers. Based on the lifestyle modifications reported by the participants, the researchers expected larger shifts in observed plasma cholesterol levels than they actually found. To explain the discrepancy, the researchers suggested a propensity of participants to exaggerate the extent of dietary and smoking changes they actually made.[177] The Stanford group also conceded that preferable measures of the program's success would have been reductions in morbidity and mortality rates—data which could not be generated because of the small scale and limited duration of the program.[178] Nevertheless, according to the measurements actually taken, plasma cholesterol levels shifted significantly during the course of the campaign.[179] The researchers concluded that "the correlations between the observed and predicted cholesterol changes imply that the reported dietary changes are at least in part real, and ought not be dismissed as entirely artifactual."[180]

Having succeeded where numerous others had failed—by demonstrating measurable changes in behavior through an educational program—the Stanford researchers have begun a new project in a much wider geographic area to determine whether the results from the three communities can be reproduced successfully.[181] They have not yet conducted any additional studies, however, to determine the staying power of the original campaign.[182]

4. *Comments*

The Stanford campaign avoided many of the pitfalls encountered by other programs. The researchers were able to raise more money for the campaign and to spend more time actually disseminating the message than, for example, the Project Burn Prevention group was able to do. Moreover, the Stanford team concentrated its efforts in small communities. The largest community in the Stanford program contained only about 15,000 people whereas Project Burn Prevention attempted, unsuccessfully, to spread its message throughout the Boston SMSA.

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[177] *Id.* at 830-31.

[178] *See* COMMUNITY HEALTH article, *supra* note 155, at 112.

[179] *See* CIRCULATION article, *supra* note 176, at 831.

[180] In addition to dietary changes, researchers also found significant improvements in the multiple logistic function of risk (MLFR). *See supra* note 160. In Tracy, the control town, the MLFR rose 6.5 percent after two years; in Gilroy, where only mass media approaches were used, the MLFR dropped 17.3 percent; and in Watsonville, where intensive instruction supplemented the mass media approaches, the MLFR dropped 30.3 percent. *See* COMMUNITY HEALTH article, *supra* note 155, at 113.

[181] Telephone interview with Dr. Nathan Maccoby, Professor of Communications, Stanford University, (Aug. 25, 1983). In the larger study, the researchers plan to use community organizations as a major information dissemination vehicle. *Id.*

[182] *Id.*

As one observer noted, the Stanford program was "perhaps the most sophisticated preventive campaign yet seen in the western world."[183] The very characteristics that contributed to the success of the program, however, illustrate the limitations of education campaigns generally. The Stanford campaign demonstrates that education campaigns can be exceedingly difficult to implement, and require large amounts of money, talent and energy to produce meaningful results.[184] While the program's mass media approach did produce measurable change, the greater success of the intensive-instructee component demonstrates that health and safety persuasion programs may best succeed when undertaken by expensive, highly labor-intensive methods. It remains to be seen whether campaigns can succeed when they are supported with less money, staffed by modestly trained employees rather than highly educated university professors and graduate students, and directed at a wider geographic area.

III. Concluding Observations and Recommendations

Government spends millions of dollars on information and education activities annually. Although the exact amount remains a matter of some mystery,[185] it is indisputable that government involvement in these activities is considerable. Yet few campaigns undertaken in this country are as carefully developed and implemented as the three analyzed in this article. Few campaigns include any pre-testing to determine message appropriateness or effectiveness. Few devote as many resources to implementing their messages. Virtually none provides for evaluations of any behavioral changes induced by the campaign.[186]

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[183] *See* Tudge, *supra* note 162, at 17.

[184] *Id.*

[185] Determining exactly how much money the federal government spends on information and education activities is difficult. *See* Yarwood & Enis, *supra* note 26, at 39 ("[t]he various components of such a figure are scattered throughout the budget, sometimes under ambiguous and/or unlikely headings"). In 1982, the government spent $205.5 million for advertising, ranking 29th out of the 100 top national advertisers in total dollars spent. ADVERTISING AGE, Sept. 8, 1983, at 1. Nearly all of this advertising, however, was done by the armed forces, the U.S. Postal Service and Amtrak. *See Squeeze on Federal Ad Budgets*, 17 MKTG. & MEDIA DECISIONS 62, 63 (1982). This figure does not include donated advertising space, which makes up a substantial portion of government advertising. *See* Clotfelter, *The Scope of Public Advertising*, in THE POLITICAL ECONOMY OF ADVERTISING 11-13 (D. Tuerck ed. 1978) (paper presented at American Enterprise Institute Conference, July 9, 1976).

[186] *See* Staelin, *supra* note 38. *See also* Bloom, *Evaluating Social Marketing Programs: Problems and Prospects*, in MARKETING IN THE 1980S: CHANGES AND CHALLENGES 460, 460 (1980) (suggesting that many social marketers tend to be reluctant to undertake evaluations because of their feelings that evaluations "tend to be expensive, bothersome, risky (i.e., budgets can be cut if results are poor), and capable of detecting only weak program effects."); Rossi & Wright, *Evaluation Research: An Assessment of Theory, Practice and Politics*, 1 EVALUATION Q. 5-52 (1977).

A. *Reflections On Three Education Campaigns*

Although the three campaigns reviewed in this Article are exceptional in many ways, none stands as such an unqualified success that one can conclude the key to public persuasion has been discovered. All provide some insight into the process of persuasion but leave major questions unanswered.

Project Burn Prevention[187] was the campaign least successful in producing measured changes in behavior. With the aid of hindsight, some of the reasons for its apparent lack of success seem clear. The program was well conceived and well executed. As the project's developers discovered, however, the program suffered in part because it relied too heavily on mass media alone, attempted to impart too many messages through too many approaches, devoted too little time to actual message implementation, and relied on an evaluation scheme that required very large shifts in injury patterns to demonstrate significant campaign-related effects on behavior.

In contrast, the Stanford Three Community heart disease campaign[188] avoided many of the shortcomings of Project Burn Prevention. The mass media saturation approach used in the Stanford study did produce statistically significant changes in behavior, but the effects of the campaign were greatest upon those individuals who also received intensive, face-to-face counseling. It may be impractical to reproduce on a national level the intensive media saturation and counseling techniques used in the heart disease campaign.

The ongoing NHTSA campaign may answer some questions about how expensive and intensive a nationwide campaign must be in order to change the behavior of large numbers of citizens. A comparison of the present NHTSA effort with previous safety belt campaigns suggests, however, that the agency is not devoting sufficient resources to produce meaningful results. Unfortunately, in view of current congressional misgivings about NHTSA's campaign,[189] greater appropriations seem unlikely.

Although we have stressed that much remains to be learned about the effectiveness of health and safety education campaigns, several points do seem clear. One important lesson to be drawn from the case studies is that health and safety hazards which apparently cannot be addressed by agency standards or other types of regulation are not therefore necessarily suitable candidates for information and education programs. These programs may have limitations as great as, or greater than, regulation.[190] Given human frailties, some accidents simply cannot be prevented.

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[187] *See supra* Section II.B.

[188] *See supra* Section II.C.

[189] *See Appropriations Hearings, supra* note 73; *Small Car Safety Hearings, supra* note 5.

Because human behavior patterns are often deeply ingrained, it also seems clear that, where possible, policymakers seeking to address health and safety concerns ought to favor campaigns that require only "one time" actions by consumers. Campaigns to promote the purchase of smoke detectors and the installation of safety latches on medicine cabinet drawers are good examples. Education campaigns that attempt to alter patterns of behavior ought to be undertaken reluctantly—only after policymakers have concluded there is no other feasible way to address a problem and that education *can* solve the problem.[191]

Health and safety education campaigns should be predicated on the assumption that changes in behavior come slowly, modestly, and often expensively. Accordingly, government policymakers should shun "campaign of the month" approaches. Once undertaken, campaigns that require long implementation periods, as many do, should be supported for the time and with the funding necessary to produce a successful result. Major campaigns, like those discussed in this Article, should include detailed evaluation components that will allow agencies to draw the appropriate lessons from their own and other campaigns.

Finally, to avoid often wasteful expenditures, government policymakers should insist that proposed education campaigns be subject to the same rigorous, skeptical scrutiny that most proposed regulatory measures currently undergo. The failure to adopt such an approach will lead policymakers to opt unthinkingly for politically popular education campaigns over more cost-effective alternatives such as regulations or, as may be appropriate in many circumstances, no action.

B. *A Proposal for Reform*

Having analyzed the potential pitfalls of education campaigns, we would like to suggest some possible reforms. We do not advocate an abrupt halt to all ongoing information and education campaigns. Nor do we recommend that agencies cease issuing press releases, fact sheets and brochures. For present purposes, we suggest several specific changes in campaigns we would classify as "major": that is, those campaigns which either (i) require annual expenditures of more than $250,000, or (ii) extend beyond one year.[192] Campaigns of this magnitude should not be commenced without appropriate care to ensure efficacy and cost-effectiveness.

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[190] *See supra* note 6.

[191] By this, we mean that government should not attempt to do the impossible. Some groups, such as hard-core drug addicts, simply may not be susceptible to persuasion by education campaigns. Government should accept this limitation.

Accordingly, policymakers should consider undertaking major campaigns only after making a number of findings and publishing them in the *Federal Register*. Publication of the findings would permit input from a variety of interested parties who might be in a position to contribute valuable suggestions. To preserve simplicity, we would not permit judicial review of the findings.[193]

The list of required findings might include the following:

1. The agency has identified the specific segments of the public particularly at risk from the hazards to be addressed by the campaign.

2. The segments of the public to be targeted are reasonably susceptible to persuasion through an education campaign.[194]

3. For campaigns designed to alter a pattern of behavior, the agency has concluded that no reasonable alternative campaign promoting a "one time" preventive action by members of the target audience could adequately reduce the hazards to be addressed by the campaign.

4. For campaigns designed to alter a pattern of behavior, the agency has estimated the time necessary for the campaign to eliminate or adequately reduce the hazards to be addressed by the campaign.

5. The educational materials and modes of distribution have been sufficiently pre-tested on a small scale to permit the agency to draw a reasonable inference that the materials will be successful on a wide scale.

6. The agency has developed a reasonable evaluation plan designed to measure behavioral changes induced by the education campaign. Where appropriate and practicable, the plan should measure actual reductions in the risks to be addressed by the campaign.[195]

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[192] These criteria represent our judgment regarding an appropriate threshold test against which to examine education campaigns. Some agencies may routinely conduct campaigns that require $250,000 annually, while the $250,000 would cover at most two or three CPSC campaigns in ten years. The one-year criterion, however, would cover a number of campaigns at the CPSC and other small health and safety agencies. These limits would not, we think, be over-inclusive.

[193] Judicial review of agency rulemaking, in contrast, is generally allowed. *See, e.g.*, Administrative Procedure Act 5 U.S.C. §§ 701-06 (1982); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392(b) (1982); Consumer Product Safety Act, 15 U.S.C. § 2060 (1982).

[194] *See supra* note 191.

[195] Obviously, the best measure of success would be reductions in deaths and injuries. In many campaigns, it will be too difficult to gather meaningful mortality and morbidity statistics. In most cases, therefore, educators should measure changes in behavior, such as increased seatbelt use, that seem likely to reduce injuries and deaths.

Education Campaigns

> 7. The agency has compared the proposed education campaign to alternative approaches, such as standards, to determine its relative effectiveness in reducing the hazards to be addressed by the campaign.
>
> 8. The costs of the campaign bear a reasonable relationship to the benefits to be derived from the campaign.[196]

Conclusion

Mark Twain once said, "Soap and education are not as sudden as a massacre, but they are more deadly in the long run."[197] We agree with Twain that education can be effective in many contexts.[198] We disagree, however, that education does much good when it takes the form of a multitude of short-term, poorly conceived campaigns. We believe millions of taxpayer dollars are spent annually on education campaigns that produce no tangible benefits. In many cases, these dollars could be spent reducing deaths and injuries through more effective means. Until more careful thought and planning are brought to bear to prevent this waste, we suspect true regulatory reform will not have arrived.

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[196] This finding does not require a formal cost-benefit analysis. It seeks a comparison of the known costs and benefits. We generally find the requirement for cost-benefit analysis to be overstressed in the case of regulations. To the extent that government engages in this type of analysis in developing regulations, it should do so for education campaigns to avoid unfairly biasing officials in favor of education campaigns.

[197] M. Twain, *The Facts Concerning the Recent Resignation*, in MARK TWAIN'S SKETCHES, NEW AND OLD 264, 265 (1875).

[198] Education programs designed to change attitudes, for instance, may complement attempts to control health and safety hazards by other means. *See supra* text accompanying notes 118-20 and 152-54.

Mr. **Barnard**. Our next witness is Hon. Stuart Statler, vice president of A.T. Kearney, Inc., and a former Commissioner of the Consumer Product Safety Commission. Welcome to the panel this morning.

STATEMENT OF STUART M. STATLER, FORMER COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION, PRESENTLY VICE PRESIDENT, A.T. KEARNEY, INC.

Mr. **Statler**. Thank you, Mr. Chairman. Your personal leadership and the oversight role of this subcommittee now for more than 2 years have been instrumental in alerting the American public to the grave hazards of ATV's.

Recently, it helped to bring about, at long last, a regulatory response on the part of the U.S. Government; namely, the executive branch. Unfortunately, the reason I am here today is because that response does not go nearly far enough.

Interestingly, and it went unreported in many places, at the time that consent order was signed, the Department of Justice also filed a complaint against this industry. The DOJ complaint filed on behalf of the U.S. Government accurately pinpoints the imminent and unreasonable risk of danger, risk of death and severe personal injury presented by ATV's, particularly three-wheeled ATV's.

Mr. **Barnard**. Can we check and see if your microphone is on?

Mr. **Statler**. By contrast, the negotiated settlement announced on December 30 conspicuously fails to do much to alleviate the danger to the public. When you look at it, what the manufacturers did is they presented an offer that the U.S Government simply couldn't accept. And lo and behold, incredibly, the Government accepted it.

That settlement omits the singular remedy which, overnight, could have appreciably reduced the huge toll of crippling injuries and deaths from ATV's; namely, recall of the product and return of consumer moneys with respect to that product.

Instead, the settlement acquiesces to a series of what I would charitably call modest, informational warning, training activities. They seem to be aimed at making a defective product something less defective by trying to change rider behavior. That hasn't worked in the past, and there is simply no reason to believe that it is going to work now.

In my view, unless three-wheeled ATV's are entirely removed from the market and from consumer use, all these activities together won't make a dent in the 250 deaths and 80,000 injuries yearly from this product.

Nor will these tried and failed informational efforts alter the fact, as CPSC studies conclude, that during the average ATV's lifespan of 7 years, there is a 1 in 3 chance that the vehicle will carry the rider to serious injury or death. I don't know of another consumer product whose injury rate begins to compare.

Imagine the public outcry if one out of three toasters or dishwashers, or vaccines, or food products were also tied to such a staggering rate of injury. The manufacturers of three-wheeled vehicles know that these vehicles are flipping over and tipping over and rolling over. They know and have known for some time that the vehicles are fundamentally flawed.

They are unstable. And the manufacturers must know, they must know that unless they remove the three-wheeled ATV vehicles from any further use and limit four-wheel models to use by adults only, the pending consent order simply won't halt the carnage.

By the terms of the consent order, owners of three-wheeled vehicles are stuck with them. There are approximately 1.5 million currently in use. They have been implicated in fully 78 percent of the 883 known deaths associated with ATV's. That was as of last August.

As of today, CPSC must be aware of well over 900, perhaps as many as 1,000 ATV-related deaths. Yet, the consent agreement settles for a rehash of more or less the same kind of warnings and informational pablum that have accompanied the vehicle these last 2 years to little effect, along with an industry promise to set up a training program that will take months or years to fully implement, if then.

The training effort is not unlike the one the industry also pledged to the CPSC to undertake 3 years ago, in March 1985, which ended in failure. It utterly failed because of lack of adequate funding and adequate staffing, lack of commitment, and probably most of all, because even the most exhaustive training won't overcome the flaws of a three-wheeled ATV which is dangerously defective in its very design.

DOJ's complaint says that at any moment, and with no sign of impending danger, even on relatively smooth terrain, the vehicle can suddenly flip over and toss the unsuspecting rider. But the consent order opts for telling riders that this can happen, and leaving them to their own devises to prevent it. That is kind of like informing the owners of Audi 5000's that their cars have a flawed transmission design which permits dangerous, sudden acceleration in going from park to drive, and simply telling them to be careful.

The approach didn't wash with NHTSA, and it won't wash with the American public.

With Congress and the Government having determined that the vehicles are dynamically unstable, all the information and owner's manuals, all the warnings, all the training in the world is not going to make a defective design go away. It will not make that design any less defective, nor will all those activities make the three-wheeled ATV any less unstable.

A design defect of such magnitude can only be remedied by changing the design for future production and recalling all those units currently in use.

A few specific comments on the consent order. As to age requirements, the Government found that youngsters under 16 lack, and I quote, "the cognitive and motor development necessary to operate these ATV's." Yet, the consent decree acquiesces to ATV use by riders at any age under 12 for vehicles under 70 CCD; and for youngsters 12 through 15, for ATV's with engine sizes up to 90 CCD. Of the 883 known fatalities, 169 victims or 19 percent of them were under 12, and 377 of them, or fully 43 percent, were under 16.

To Mr. Craig's comment that 30 percent of the deaths were attributable to alcoholism, I can't imagine that anywhere near 30 percent, or even 1 percent, or any significant portion of those 377 youngsters under 16 were drunk.

Moreover, the consent decree talks in terms of age recommendations. There is no outright prohibition on use by youngsters under 16.

As to the false and deceptive promotion that the complaint identified, as a result of the consent order, false and deceptive promotion may now cease. Parents who, when their youngsters were toddlers, bought them these foot pedalled "Big Wheels"—we are all familiar with them—were led to believe three-wheeled ATV's were simply motorized trikes, equally safe and stable.

How wrong. They turned out to be, in the words of Senator D'Amato, "rolling death machines." But the consent order perpetrates the myth spread by this industry that so many of the incidents to kids are due to "Lack of parental supervision." Supervision is not the answer. It ignores the vehicles' underlying flaws. It is a copout.

The key is in eliminating use of three-wheel vehicles altogether and making sure that four-wheel ATV's are not available to kids.

As to the training requirements of the consent order, I have a hard time understanding how training of any sort will overcome the three-wheelers' intrinsic instability. But the consent order limits even training to those ATV buyers and their families who purchase vehicles in the future, and those who have purchased them within the last 12 months.

In other words, such training is almost wholly irrelevant to the 1.5 million three-wheelers currently in use, not recalled. Almost all of them were purchased before 1987. For the 12 months of 1987, figures show that about 93 percent of the ATV's sold were four-wheeled versions and only 7 percent were three-wheeled versions. Thus, almost the entire population of owners and users of three-wheelers, those most at risk, are arbitrarily excluded from the coverage of the consent order's training requirement.

On the issue of the consent order banning these vehicles, notwithstanding anything you may have heard to the contrary, three-wheelers are not—I repeat—not banned by the terms of this agreement. Even if they were, it would be an essentially meaningless concession. As of late last summer, when the manufacturers introduced their 1988 models, there was not a single three-wheeler still being produced. So the question arises, how can you ban something that is no longer being produced?

Since there are an estimated 30,000 to 40,000 so-called new or unsold three-wheel models from previous years still in dealer inventories, only those are affected and only for the time being. As has been pointed out here, the agreement contains a provision that subject to standards being promulgated by CPSC, those three-wheelers may indeed come back on the market. And so what you have here is that even though the three-wheeled ATV with a solid rear axle and high center of gravity is determined to be inherently defective and imminently hazardous—by virtue of its design, marketing, promotion, lack of testing, and the like—when all the current brouhaha dies down, with a simple further nod by CPSC in the industry's direction, three-wheelers may be sold anew.

As to the issue of used three-wheelers, the so-called stop sale provision halts the marketing and sale of three-wheelers which are new or have not been sold yet to a consumer. It does not apply to used three-wheelers already possessed by dealers or which may be turned in by consumers in the future.

In other words, leaving aside the 30,000 to 40,000 new three-wheelers still in dealer inventories, none of the 1.5 million three-wheelers already in use are subject to this restriction. Throughout their useful life they may be sold and resold, and again by dealers, without violating the consent order. And since the agreement imposes a training requirement only for new vehicle sales, manufacturers and dealers have no obligation whatsoever to train purchasers of these secondhand or used ATV's.

I am going to ask that my entire statement be placed in the record.

Mr. BARNARD. Without objection, it will be done, sir.

Mr. STATLER. I would conclude, in order to permit questioning, that the Department of Justice and the CPSC clearly got outsmarted in this negotiation. They got outlawyered, as Senator D'Amato pointed out. They got snookered into agreeing to a string of vapid assurances that commit the ATV industry to nothing when it comes down to it, while duping the American public into thinking that at long last a serious and imminent hazard is being eliminated.

Before even entering these discussions with the industry lawyers, Department of Justice and CPSC negotiators cast aside the only real remedy that could make a difference in appreciably reducing the toll of ATV tragedy, which has become a daily nightmare. Absent such a recall and refund, especially for the 1.5 million three-wheelers in use, the debilitating injuries, paralysis, and the deaths we have seen associated with these vehicles over the last 5 years, will persist.

Perhaps now the Congress should take matters into their own hands through legislation requiring precisely the recall result which the Department of Justice complaint seeks. That would avoid altogether putative concerns about years of protracted litigation and about Government litigation costs, which purportedly were key factors in Department of Justice and CPSC beating a retreat and acquiescing to this rather useless settlement.

Mr. Chairman, as you pointed out in your opening statement, when I last testified before this subcommittee in May 1985, I urged prompt remedial action on ATV's, in view of what was then 161 ATV-related fatalities and 125,000 serious injuries.

Now, 2½ years later, nothing has been done, substantively, to deal with the hazard. Today, we know of more than 900 fatalities and over 330,000 serious injuries from ATV's. If the consent decree before us is the best that the combined forces of the U.S. Government can do to address this danger, I urge you, don't delay any further in the face of ongoing tragedy each and every day.

Pursue a legislative solution as the most direct and effective means for ensuring an adequate response to this grievous safety issue, which amounts to nothing less than the single most critical hazard before the CPSC in its 15-year history and which, as a result of this so-called negotiated agreement, has been colossally botched.

[The prepared statement of Mr. Statler follows:]

TESTIMONY OF

STUART M. STATLER

BEFORE THE SUBCOMMITTEE ON
COMMERCE, CONSUMER, AND MONETARY AFFAIRS
# of the
COMMITTEE ON GOVERNMENT OPERATIONS

UNITED STATES HOUSE OF REPRESENTATIVES

January 28, 1988

Mr. Chairman, thank you for inviting me to revisit the issue of ATV hazards and assess the pending Department of Justice/CPSC consent order, governing the ATV industry, now pending for final approval by the United States District Court here in Washington, D.C. Your own personal leadership on this vital safety issue, and the oversight role exercised by this Subcommittee for now more than two years, has been instrumental in alerting the American public to the grave hazards of ATVs. Recently, it helped to bring about, at long last, a regulatory response by the Executive Branch. Unfortunately, that response doesn't go nearly far enough.

SUMMARY

In short, I believe that the DOJ complaint, filed on behalf of the United States Government, accurately and fairly pinpoints, in exacting detail, the "imminent and unreasonable

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* Currently a partner and Vice President of A.T. Kearney, Inc., international management consultants, Mr. Statler heads up the firm's Risk Avoidance and Product Liability practice areas. He formerly served as Commissioner and acting-Chairman of the U.S. Consumer Product Safety Commission. The views expressed are entirely his own and do not necessarily reflect those of his company.

risk of death and severe personal injury" presented by ATVs, particularly 3-wheeled ATVs. By contrast, the negotiated settlement announced on December 30 conspicuously fails to do much to alleviate the danger to the public.

It omits the singular remedy which, overnight, could reduce the huge toll of crippling ATV injuries and deaths* - namely, recall of the product.

Instead, the consent order acquiesces to a series of what I would charitably call "modest" informational, warning, and training activities apparently aimed at making a defective product somehow less defective by trying to change rider behavior. That hasn't worked in the past and there is no reason to believe it will work now. In my view, **unless this dangerous product is entirely removed from the market and from consumer use, all of those activities together won't make a dent in the almost 250 deaths and 80,000 serious injuries yearly from ATVs.**

Nor will these tried and failed informational efforts alter the fact that, as CPSC studies conclude, **during an ATV's average lifespan of seven years, there is a one-in-three chance that the ATV will carry its rider to serious injury or death.** I don't know of another consumer product whose staggering injury rate begins to compare. Imagine the public hue and cry if 1 out of 3 toasters, dishwashers, vaccines, or food products was tied to a serious injury or death!

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* See Attachment I

The manufacturers of 3-wheeled ATVs **know** that these vehicles are flipping over, tipping over, and rolling over. They **know** who's using them. They **know** who's getting maimed and crushed and paralyzed and killed. It's mainly young kids - many of them 5, 8, 11, 14 years of age - who don't have the faintest inkling of the risk involved and who can't appreciate that risk. Many youngsters, as the DOJ complaint spells out, don't have the physical coordination or maturity to master the delicate balancing contortions that riding them demands.

The firms also **know, and have known for some time,** that the vehicles are fundamentally flawed. They are unstable. And they **must know** that unless they remove the 3-wheeled versions from any further use and limit 4-wheeled models to use by adults only, the pending consent order won't halt the carnage.

* * * *

THE UNREASONABLE RISK

As with any other recreational sport, some ATV riders engage in misguided practices that can lead to their own undoing. They may ride without proper training, or ride double, or absent helmets, protective clothing or gear, or after drinking alcohol. But apart from any possible misuse or abuse, the evidence assembled by the CPSC and the Department of Justice confirms that the very design of the 3-wheeled ATVs render them inherently unstable and unreasonably dangerous.

The plain fact is that 3-wheeled ATVs are not like motorcycles, dirt bikes, or bicycles or any sort, which everyone knows can fall over. ATVs look like they won't. Because they look so stable, buyers assume they are. And because of what the DOJ complaint identifies as past fraudulent and deceptive marketing and advertising explicitly aimed at kids, parents buy them for their kids **thinking they are safe.** Youngsters and parents have been lulled into believing that the vehicle couldn't possibly tip over.

But based on the overwhelming evidence assembled by the Commission, the design and performance characteristics of 3-wheeled ATVs commonly and regularly lead to tipover, flipover, and rollover. The reason is simple: **In order to operate the vehicle properly, a rider must induce instability.** To turn a 3-wheeler, because of its solid rear axle, one of the rear wheels must break traction with the ground, causing the vehicle to be precariously balanced on 2 wheels, 1 front, 1 back. In doing that, the rider must shift his weight to the outside of the turn while at the same time maneuvering his body to the inside of the turn. Not only is the vehicle unbalanced, but the rider is also. And the slightest miscue or terrain irregularity will send both of them flying.

This maneuver is entirely contrary to what our instincts tell us and what our experience with other vehicles may have taught us. After identifying the ATV as being "dynamically unstable and complicated to operate," the DOJ complaint goes on to say that "... they require the rider to perform a difficult, demanding and delicate balancing act, with the risk that the vehicle will go out of control at any moment."

The DOJ complaint further notes that:

> "At times, ATVs require actions on the part of the operator which are not only physically difficult but also counter-intuitive. For example, to successfully execute a turn, the operator, in addition to steering the handlebars, must shift his or her body weight to the outside (rather than inside) of the turn, while at the same time leaning toward the turn. This must be done to reduce the weight on the inside rear wheel and overcome the straight-ahead directional force created as a result of the solid rear axle. Failure to un-weight the inside rear wheel will result in the vehicle continuing to plow straight ahead rather than turn in the direction intended. On the other hand, un-weighting the inside rear wheel too much will cause the ATV to tip over.
>
> "There is virtually no margin for error in the operation of an ATV because of such peculiar operating characteristics. If an ATV is not operated in precisely the right way for the particular circumstances, loss of control is likely to result with little or no sign of impending danger and insufficient time to take corrective action.
>
> "The smallest operational error can result in death or severe personal injury because the ATV, due to its high center of gravity and highly frictional balloon-type tires, is prone to tip and roll over on the rider, roll end-to-end and land on the rider or violently throw the rider, when the rider loses control. Due to the design of the ATV and the necessity for rider input to control the vehicle, the rider is often unable to jump clear of the vehicle. When the ATV tips or rolls over on the rider, the weight of the ATV may crush the rider, seriously aggravating the resulting injuries.
>
> "Loss of control can result even while operating at slow speeds or when contact is made with very minor terrain irregularities, such as small bumps, rocks, holes or ruts. ATVs are marketed for operation over terrain that typically contains such irregularities.
>
> "Loss of control occurs more readily with three-wheeled ATVs than with four-wheeled ATVs."

Apart from the defective tripod design/solid rear axle, and precarious handling due to their dynamic instability, these vehicles constitute an unreasonable risk, according to the DOJ complaint, for any number of other reasons including:

- A relatively high center of gravity accentuating their instability.

- Highly frictional balloon tires which, in earlier models, were the sole means of suspension, instead of incorporating adequate and independent front and rear suspension to cushion movement over jarring surfaces or obstacles in an off-road environment.

- A capability of achieving speeds - in excess of 50 mph on many models - which are clearly inappropriate and unsafe for the vehicle's intended purpose and use in an off-road environment where terrain irregularities are common and are to be expected.

- An elongated seat design which effectively invites passengers, notwithstanding any warnings to the contrary indicating that the vehicle's handling and stability are adversely affected by passengers.

- Lack of adequate warnings both on the vehicle itself and in the owner's manual.

- Lack of sufficient testing as to the safety of the design, especially as to use by children, since any adequate test program early on would have identified the inherent instability of the vehicle.

- Lack of hands-on training provided by manufacturers for all purchasers and intended users.

- Overall marketing practices which emphasized "an entirely false and dangerous sense of security and unrealistic expectations on the part of purchasers and users" including "the illusion that anyone, including children under 16 ... [could] easily and safely ride ATVs with no training and little or no practice." (DOJ complaint)

- Deceptive advertising which "failed to alert and warn purchasers and users about the complex handling characteristics of ATVs and the hidden hazards of ATV riding ... [nor] the need for hands-on training."

- Inadequate labeling on the vehicle itself which fails to reasonably warn of the risks and hazards, does not meet generally accepted design criteria, and exceeds the readability level of users;

- Accompanying representations by dealers, with the implied consent of the manufacturers, of "dangerously insufficient, deceptive or false information" about the vehicles.

The huge toll of ongoing crippling injuries and deaths especially to unsuspecting children, coupled with the inherent instability of the 3-wheeled ATV's design, mark this vehicle as an imminent hazard and unreasonable risk of injury if ever there was one. In my seven-year tenure as Commissioner at CPSC, of all the product risks and hazards staff brought to our attention, none struck me as more urgently in need of prompt remedial action and recall.

DEFICIENCIES OF THE CONSENT ORDER

The deficiencies of the preliminary consent decree are as follows:

1. The DOJ complaint states that:

> **"Far from being safe, easy-to-ride vehicles for harmless play, as defendants have falsely and deceptively represented them to be, ATVs actually are unique and complex vehicles, requiring for their successful operation constant and precise rider manipulation which is neither instinctive nor easily mastered by a person of ordinary skill....[T]here is virtually no margin for error in the operation of ATVs because of their peculiar operating characteristics, and the penalty for making the smallest miscalculation may be death or serious injury."**

Notwithstanding that assessment, the consent order permits the most hazardous of these vehicles, namely 3-wheeled ATVs, to remain on the market. Owners are stuck with them. There are approximately 1.5 million such vehicles currently in use. As CPSC studies document, since 1982 these 3-wheelers have been implicated in fully **78%** of the 883 known deaths associated with ATVs. That was as of last August. As of today, CPSC must be aware of well over 900 or even 1,000 ATV-related deaths. (I find it incredible that the agency does not have a much more recent and continuously updated tally, in view of the fact that this matter is - and has been for three years - the highest hazard priority confronting the Commissioners.)

2. The DOJ complaint states that:

> **"The United States brings this action to gain the immediate relief necessary to protect the public from the unreasonable and imminent peril in which the defendants have placed, and continue to place, the millions of innocent inadequately informed individuals who presently operate, or will in the future operate, ATVs."**

Yet the consent agreement settles for a rehash of more or less the same kind of warnings and accompanying "educational" or informational platitudes that have accompanied the vehicle these last two years to little effect; along with an industry promise to set up a training program which will take months or years to fully implement, if then. The training effort is not unlike the one the industry also pledged to the CPSC to undertake 3 years ago, in March 1985, which ended in failure. It failed because of lack of adequate funding, lack of staffing, lack of industry commitment, and probably most basically because even the most exhaustive training won't overcome the flaws of a 3-wheel ATV which is dangerously defective in its very design.

The consent order does not provide any semblance of the "immediate relief" which the complaint determines to be needed - specifically, removing from use the most hazardous vehicles: all 3-wheelers, and 4-wheelers purchased for youngsters under 16. Absent such immediate relief, we are left with the current toll of 20 deaths and 7,000 injuries each passing month.*

3. The DOJ complaint states that:

> "The risk of harm presented by ATVs is both imminent and and unreasonable. Each time an ATV is operated, a rider ... faces an unacceptably high risk that, at any moment and with no sign of impending danger, he or she will either be killed or suffer a severe personal injury."

Notwithstanding this assessement of "unacceptably high risk," the consent decree permits 3-wheeled ATVs, which are demonstrably defective in their design, to remain in consumers hands. Although "at any moment and with no sign of impending danger," even on relatively smooth terrain, the vehicle can suddenly flip over and toss the unsuspecting rider, the consent order permits their continued use. It opts instead for telling riders that this can happen and leaving them to their own devises to try to prevent it.

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* Actually, over the last two full reporting years (1985 and 1986), during the five months (May-September) of peak usage, CPSC figures point to deaths associated with ATVs occurring at the rate of 30 per month, or 1 each and every day. Serious injuries approximate 10,000 per month, or more than 300 each day.

That's kind of like informing the owners of Audi 5000s that their cars incorporate a flawed transmission design which permits dangerous, sudden acceleration in going from "Park" to "Drive," and then simply telling them to be careful. That approach didn't wash with NHTSA or with the American public.

4. The DOJ complaint states that:

"ATVs are imminently and unreasonably hazardous for a combination of reasons:

(a) **"First, the ATV design is such that an ATV appears to be safe and stable, belying the fact that it actually is dynamically unstable and complicated to operate."**

Having determined the ATV design itself to be "dynamically unstable," the Government has concluded that 3-wheel ATVs are faulty in their design. All the information in owners' manuals, all the warnings, all the training in the world is not going to make a defective design any less defective. Put another way, since the vehicle is dynamically unstable, warnings about its use - and even training - will not make the 3-wheeled ATV any less unstable. A design defect ordinarily is remedied by a change or modification of that design for future production; those units currently in use are recalled.

At the present time, unless and until a correction is made - if it even can be made - a recall notification should issue forthwith to the owners of some 1.5 million 3-wheeled ATVs.

(b) **"Second, the nature of the ATV and its operation is such that, frequently, when a rider loses control, before having time to react, the vehicle rolls over on the rider or throws and lands on the rider, aggravating the accident to the extent death or severe personal injury all too often results."**

What the Government is saying by this finding is that - apart from the ATV's inherent instability - that defect is compounded by the vehicle's demonstrated tendency when out of control to come crashing down on the unsuspecting victim. Incidents which might otherwise involve the rider being thrown and suffering less severe injuries become magnified when the 400-plus lb. vehicle subsequently impales the thrown rider. CPSC analysis of actual incidents point to this secondary effect occurring rather "frequently" as compared to incidents, for example, where a rider may lose control of a motorcycle.

Again, the design of the vehicle itself contributes to this demonstrated secondary effect, and renders the 3-wheeled ATV all the more defective for that reason. Merely warning people about this secondary effect, or educating or training them to anticipate it, is not going to change the fundamental fact that the vehicle has a proclivity, once out of control, to land upon and crush an already injured rider.

(c) **"Third, defendants have encouraged the use of adult size ATVs by children under 16, who lack the cognitive and motor development necessary to operate such ATVs safety."**

Notwithstanding the Government's finding that youngsters under 16 lack the "cognitive and motor development necessary" to operate these ATVs, the consent decree acquiesces to ATV use by riders **at any age less than 12** for vehicles under 70 CCD, and for youngsters 12-15 years of age for ATVs with engine sizes less than 90 CCD. "Under 12" literally encompasses children as young as 5, 6, 7 and 10 - to whom serious injury and death have occurred at every level - who clearly lack the "cognitive and motor development necessary" to operate ATVs safety. **Of the 883 known fatalities from ATVs, 169 victims or 19% have been "under 12." 377 victims or fully 43% were "under 16."**

Moreover, the consent decree talks only in terms of age "recommendations." There is no outright prohibition on use by children under 16; nor is their any effective means, within the terms of the decree, for restricting use by youngsters at these vulnerable ages.

The consent decree should have recalled 3-wheeled ATVs outright, and restricted 4-wheeled ATVs to "Adults only."

(d) "Fourth, the maniuplative skills absolutely essential for safe ATV operation are neither instinctive or easily acquired, especially by children under 16."

To repeat, notwithstanding this Government conclusion, the consent order does not effectively keep these vehicles out of the hands of children under 16. In my own view, the industry's so-called "child-sized" ATVs - from 50 to 90 CCD according to the language of the consent order - merely induce an illusion of safety and lead to, even encourage, use of the higher-powered, adult-sized ATVs by young children. I note that the one American company directly impacted by the consent order believes that use by youngsters **under 18** is improper. In its separate consent order, Polaris reiterated its stated policy in no uncertain terms: **"Never allow a child under 18 years old to drive a Polaris ATV. Children do not have the strength, size, skills or judgment to drive an ATV safely."**

(e) "Fifth, defendants have falsely and deceptively promoted ATVs as safe, easy to operate vehicles for the entire family and have created the illusion that riders of all ages can perform remarkable feats and stunts safely and with ease."

It would appear, as a result of the consent order, that this kind of false and deceptive promotion may cease. Parents who - when their youngsters were toddlers bought foot-powered "Big Wheels" for them - were led to believe that 3-wheeled ATVs were simply motorized versions, and equally stable and safe. How wrong they were. The "super trikes" turned out to be, in the words of Senator Alphonse D'Amato (R-NY), "rolling death machines."

I am troubled, however, that the language of the consent order continues to perpetrate the myth spread by this industry that so many of the incidents to youngsters result from, or are attributable to "lack of parental supervision." The ATV industry has yet to provide a satisfactory explanation as to how - when a youngster is traveling at any speed in excess of 2 to 4 mph where a parent might literally be able to walk alongside - any parent could effectively exercise supervision under normal riding circumstances. Once a youngster is proceeding at 5, 15, or 30 mph or more, as these vehicles are eminently capable of, there is almost nothing a parent can do under those circumstances to exercise effective supervision; that is, short of the parent riding along as a passenger - which would be an unsafe and prohibited activity.

Supervision is not the answer. It ignores the vehicle's underlying instability. It's a cop-out. The key is in eliminating from use 3-wheeled ATVs altogether, and in making sure that 4-wheeled ATVs are not available to anyone less than 16. Personally, I tend to agree with Polaris' policy of restricting use to adults, 18 years or older. If that is the precondition, and we are talking only about 4-wheelers, then proper warnings, educational material and comprehensive training might make a real difference.

(f) **"Sixth, defendants have failed to effectively alert operators to the risks and hazards presented by ATVs and to the dire conseqences of not abiding by prohibitions and instructions."**

The consent decree would appear to overcome this marketing and promotional defect. But the efficacy of future warnings, as well as informational and training programs, is undermined by the reiteration both in the consent order and accompanying documents that the defendants "contest the validity of the allegations made by the Government"; that defendants "do not admit that ATVs are or have been unsafe or defective"; and similar assertions which tend to bely the extremely grave hazard presented by these vehicles.

In commenting on the settlement, one spokesman for the industry's trade group, the SVIA, continued to maintain to a Washington Post reporter that "ATVs are safe when ridden properly." Not so. What is exhaustively confirmed by the DOJ complaint, as well as CPSC analysis, is that **even when ridden properly, these vehicles tend to flip or roll over because they are dynamically unstable in their design.**

A spokesman for Honda was quoted by the LA Times to the effect that, "To my knowledge, the government has not found any defect in the design of ATVs whatsoever." He must not have read the DOJ complaint. He went on to say that "Their statistics show that rider behavior is the major cause of accidents." Again, the DOJ complaint demonstrates clearly that the dynamic instability of the vehicle, accompanied by false and deceptive marketing as to its safety, is the major cause of ATV-related tragedy. Until the industry stops speaking out of both sides of its mouth, the safety message they pledge to convey will be lost.

(g) **"Seventh, defendants have not offered and actively promoted free, effective hands-on training for ATV purchasers, even though such instruction is absolutely essential to impart the complex skills required to operate ATVs."**

In the context of a 3-wheeled vehicle that is demonstrably unstable and defective in its design, I have a hard time understanding how training of any sort will overcome this intrinsic problem. One has to question the utility of training in this context. Based on CPSC's analysis of a representative national sample of all ATV-related injuries treated in hospital emergency rooms, some 54% of the drivers involved in incidents had at least 1 year's experience on ATVs. While many may not have had formal training, the analysis tends to confirm that even repeated experience on an ATV, and familiarity with its uncommon handling, does not preclude the possibility of sudden and unexpected overturning as a result of the vehicle's inherent instability.

Notwithstanding my skepticism, the consent order is woefully deficient as to its training requirement because it limits such training only to those ATV buyers and their families who purchase vehicles in the future and those who have purchased such vehicles within the last 12 months. Obviously, then, the training proviso is almost wholly irrelevant to the 1.5 million 3-wheeled ATVs currently in use and not recalled by this agreement. Almost all of them were purchased prior to 1987. Over the 12 months of 1987, industry/CPSC figures show that about 93% of the ATVs sold were 4-wheel versions, and only 7% 3-wheelers.

Thus, almost the entire population of owners and users of the 1.5 million 3-wheelers in use - those most at risk - are arbitrarily excluded from the coverage of the consent order's training "requirement."

* * *

Let me add a few additional points for this Committee and the Congress to weigh in determining the sufficiency of the Government's response in agreeing to a negotiated settlement that does not, by its terms, "adequately address an unreasonable risk of injury" as required by the Consumer Product Safety Act.

First, notwithstanding anything you may have heard from CPSC, the Justice Department, or media reports coming out of the December 30 joint press conference announcing this consent order, 3-wheeled ATVs are not - I repeat, not - **banned** by the terms of this agreement. Even if they were, it would be an essentially meaningless concession on the industry's part. **As of late last summer, when the several manufacturers introduced their 1988 models, there was not a single 3-wheeler still being produced.**

The industry ascribes that to "market demand" for 4-wheelers. Giving credit where credit is due, I ascribe it to the manufacturers silently acknowledging the fundamental design flaws associated with the 3-wheel concept. They assigned 3-wheelers to the same scrap heap as the 3-wheeled tractors of the 1940's which also proved to be especially unstable and dangerous. The ATV industry finally faced up to the reality that any more 3-wheelers produced would only add to the considerable product liability associated with that mistake, the sheer magnitude of which is only beginning to surface.

So the question arises: how can you ban something that is no longer being produced? DOJ proclaimed in the opening sentence of its press release announcing the agreement that the industry was "ending the sale of all 3-wheel ATVs" which technically is correct. But the assertion gives rise to the mistaken impression, as picked up by the media, that 3-wheeled sales are banned. Not so.

Since there are, by government and industry estimates, only some 30-40,000 "new" and unsold 3-wheeled models from previous years left in dealer inventories, **only those are affected ... and only for the time being**. Tucked away in section L 3 of the consent order is language that "To the extent that 3-wheeled ATVs meet mandatory standards (to be) promulgated by the Commission or voluntary standards satisfactory to the Commission ... the marketing and sale of such vehicles shall be permitted," nothwithstanding any previous indications to the contrary.

In other words, even though the 3-wheeled ATV with solid rear axle and high center of gravity is demonstrated by DOJ and CPSC to be inherently defective, imminently hazardous, and unreasonably dangerous by virtue of its design, marketing, promotion, lack of testing and the like - when all the current brouhaha dies down, with a simple further nod in the industry's direction by CPSC, 3-wheeled ATVs may be sold anew.

If the current group of Commissioners could summon up 2 votes to sanction a consent agreement so palpably inadequate as this, I have every confidence that 2 votes could also be found to approve a wholly inadequate standard permitting the resurrection and sale of 3-wheelers in the future.

Second, the so-called "Stop-Sale and Repurchase Provision (paragraph F) of the consent order is extremely limited. It halts the marketing and sale of 3-wheeled ATVs **"which are new or have not yet been sold to a consumer."** The restriction does **not** apply to **used** 3-wheelers which are already in the possession of dealers (or manufacturers for that matter) or which may be turned in by consumers in the future.

In other words, leaving aside the 30-40,000 "new" 3-wheelers still in dealer inventories and never before sold, none of the approximately 1.5 million 3-wheelers already in use would be subject to this restriction. Throughout their useful life, **they may be sold and resold** by dealers without violating the consent order. And, since the consent order imposes a training requirement only for "new" vehicle sales, dealers have no obligation or incentive to train purchasers of second-hand or used ATVs. These appear to be particularly glaring omissions in view of the DOJ complaint citing these vehicles as "an imminent and unreasonable risk of death and severe personal injury."

Third, nor does the consent order give any guidelines as to what would constitute **sufficient** "credit or other commercially reasonable adjustment" for the 30-40,000 vehicles which would be subject to the stop-sale and repurchase requirement of paragraph F. That's left up to the manufacturers to determine. Without appropriate incentive, they won't be turned in.

Fourth, by the very terms of this agreement, section H 3:

> "The United States, through the Consumer Product Safety Commission, reserves the right to proceed administratively under section 15 [of the CPSA or the FHSA, or both] with respect to ATVs manufactured or distributed by defendants, if it determines **12 months or more subsequent to the court's approval of the final consent decree, that new and substantial evidence** indicates that a further and more extensive remedy, including recall or repurchase is warranted." (emphasis added)

What that really says is that the United States Government abdicates any responsibility it has to remove these hazardous vehicles from the market **for at least the next 12 months**; and at that time, **only** if it can come up with some kind of "new and substantial evidence" (whatever that means) may it authorize further remedial action such as a recall and refund to owners.

Thus, if it turns out for 1987, when all the figures are in, that not 250 but 350 persons were killed on ATVs - or 500 - neither CPSC nor the whole of the United States Government can do a blessed thing to bring a halt to this mayhem until at least 12 more months expire, according to the terms of the consent agreement.

Surely, most observers would have thought that something on the order of 900 deaths and 330,000 serious injuries associated with these vehicles over the last 5 years would have been sufficient basis to justify a recall and repurchase now. Arguably, under this language, even if the toll of tragedy "merely" remains in the vicinity of some 300 deaths and 80,000 serious injuries over the next 12 months, that might not qualify as "new and substantial evidence," to justify more forceful and effective regulatory measures.

With the notable exception of the good sense and leadership demonstrated by CPSC Commissioner Anne Graham in denouncing this consent agreement, I have never come across such a blatant abdication of responsibility on the part of federal safety officials from what an agency's enabling legislation **requires** them to do. How many more deaths does it take before too many people have died on 3-wheeled ATVs?

* * * *

Fifth, paragraph E 1 (c) references a so-called "ATV Safety Verification Form," attached as Appendix C to the consent order. It may undermine the ability of anyone injured in an ATV accident in the future from seeking and obtaining appropriate relief and damages in the courts.

The form, which in the future must be filled out and signed by prospective purchasers, amounts more or less to a release of the manufacturer from liability. Purchasers may unknowingly be signing away the legal rights they now have. By virtue of these pledges, the purchaser is likely to be held to have "assumed the risk," the true dimensions of which can't possibly be appreciated until it's too late.

These pledges ignore the fact that 3-wheeled vehicles intended for these purposes are inherently unstable, defective, and an imminent and unreasonable risk to public safety. This "release," as a condition of the consent agreement, puts the Government's imprimatur on the industry's long-held and now-discredited contention that all the injuries and deaths associated with ATVs are merely a problem of rider carelessness rather than the fundamental instability of the vehicle.

It is senseless to have someone sign a waiver to **"Never drive an ATV at excessive speeds,"** when there's absolutely no guidance given to what "excessive" means for a vehicle that can go upwards of 50 mph. It is equally meaningless to have a purchaser pledge to **"Always be extremely careful when driving an ATV, especially when approaching hills, turns, and obstacles and when driving on unfamiliar and rough terrain."** Surely, when the next vehicle flips from an obstacle or turn - and injury results - the ATV manufacturer will contend that the rider violated his/her pledge to be "extremely careful."

What the Justice Department and CPSC have done is not only permit a hazardous vehicle to remain in use, but penalize those who use them in the future by curtailing what would otherwise be their rightful legal recourse when tragedy strikes.

* * * *

CONCLUSION

The United States Government - both DOJ and CPSC - were right on point in their assessment and characterization of the imminent and unreasonable risk of death and severe personal injury to the American public presented by ATVs. They then proceeded to gain industry approval of a wholly inadequate response to that grave hazard.

They clearly got outsmarted. They got outlawyered. They got snookered into agreeing to a certain vapid assurances that commit the ATV industry to next to nothing while duping the American public into thinking that at long last a serious and imminent hazard is being eliminated.

This consent order makes a mockery of the Government's public safety role which Congress envisioned when it passed, and the President signed into law, the Consumer Product Safety Act back in 1972.

Government negotiators entirely omitted from the negotiations **from the outset** any effort to require the defendant ATV manufacturers to offer a reasonable refund for return of all 3-wheeled ATVs and adult-sized 4-wheeled ATVs purchased for use by children under 16 in the purchaser's immediate family. That's what the CPSC voted in December of 1986. That's what the DOJ complaint says is needed. But that's nowhere to be found in the consent agreement and, by all accounts, was never even on the table for consideration!

Before even entering discussions with the ATV industry, DOJ and CPSC negotiators cast aside the only real remedy that could make a difference in appreciably reducing the toll of ATV tragedy which has become a daily nightmare. Absent such a recall and reasonable refund, especially as to the 1.5 million 3-wheeled models in use, the debilitating injuries, paralysis, and deaths which we've now seen associated with these vehicles over the last five years will persist.

In the end, the liability costs to the affected companies - from allowing these 3-wheelers to remain in use and exacting a further toll - will far outweigh the admittedly heavy costs of a recall now. And so, not only is the public ill-served, and our society as a whole in terms of the billions of dollars of added medical costs, lost earnings, and litigation arising from these tragedies. But the industry is also ill-served. Although I'm sure it will take them yet another few years, as the liability surges, to realize just how badly.

I urge this Committee, and all those interested within the Congress, to do everything possible to convince the DOJ/CPSC decisionmakers that the final consent decree should not be approved. If that effort fails, you might urge the Federal District Court before whom the final decree is pending to disapprove of the order as being contrary to the public interest. The settlement is in contravention of the provisions of the Consumer Product Safety Act since a known unreasonable risk is not being adequately addressed. Moreover, the interests of justice clearly will not be served by approval of this agreement.

Perhaps the best course would be for the Congress to take matters into its own hands through legislation requiring precisely the recall result which the DOJ complaint intended to accomplish. A bill recently has been introduced by Representative Joe Barton (R-TX) to that effect, as an amendment to the Committee print of HR 3343 now pending before the House Energy and Commerce Committee. Such an approach would avoid altogether the putative concerns over "years of prolonged litigation" and "government litigation costs," which reportedly were key factors inducing DOJ/CPSC's hasty retreat in acquiescing to this wholly inadequate settlement.

Mr. Chairman, when I last testified before this Subcommittee in May 1985, I urged prompt remedial action on ATVs in view of what was then **161 ATV-related fatalities and 125,000 serious injuries.** Two and one-half years have passed with nothing at all being done, substantively, to deal with the hazard. Today we know of **more than 900 fatalities and 330,000 serious injuries from ATVs.** If the consent decree before us is the best that the combined forces of the Department of Justice and CPSC can do to address this danger, don't delay any longer in the face of ongoing tragedy each and every passing day.

I commend this Committee's attention to pursuing a legislative solution as the most direct and effective means for ensuring an adequate response to this grevious safety issue which amounts to nothing less than the single-most critical hazard before the CPSC in its 15 year history. And which, as a result of this "negotiated" agreement, has been colossally botched.

* * * *

ATTACHMENT I

INJURIES AND FATALITIES FROM ALL-TERRAIN VEHICLES (ATVs)

During the past six years, the popularity of 3-wheeled and 4-wheeled ATVs soared, showing more than a twenty-fold increase (2000%) in units in use according to both industry and CPSC estimates:

Year:	1980	1981	1982	1983	1984	1985	1986
Shipments:	136,000	197,000	306,000	484,000	650,000	594,000	447,000

ATVs in use in mid-1987 approximated 2.4 million, with 6.75 million estimated users. This was a sizable jump even from the 1.7 million units in use at the end of 1984. The figure grew by about 30% in 1985; by about 10% in 1986. 3-wheel ATVs represented almost the entire market through 1982. In 1983, 4-wheel ATVs still comprised only about 11% of sales, rising to 28% in 1984, 61% in 1985, 80% in 1986, and 93% in 1987. For 1987, based on reports from the four major manufacturers - Honda, Yamaha, Suzuki and Kawasaki - only six 3-wheeled models were produced and sales represented only 7% of all ATVs sold; two of the majors did not produce any 3-wheelers for 1987. For 1988 models now being sold, there are not expected to be any 3-wheel vehicles produced, although dealer inventories reportedly included some 30-40,000 3-wheelers at the end of 1987. About two-thirds of ATVs currently in use are 3-wheeled. Retail price of an ATV ranges from $600 to $3,500, averaging $2,500.

According to the CPSC, during an ATV's average lifespan of seven years, there is a one-in-three chance that the ATV will carry its rider to serious injury or death.

INJURIES: With the steep rise in sales in the early 80's, injuries serious enough to be treated in hospital emergency rooms surged. Incidents in 1985 increased by one-third over 1984; by 3 times over 1983; and by 10 times over 1982. For 1986, such injuries totaled 86,400 - about the same as the '85 level. For the first nine months of 1987 (thru September), yet another estimated 63,600 ATV-related injuries were treated in hospital emergency rooms. Over the last five years, more than 327,000 serious injuries were associated with ATVs:

CPSC Est. of ATV Injuries Treated in Hospital Emergency Rooms

Year:	1981	1982	1983	1984	1985	1986	1987
Injuries:	6,000	8,600	26,900	63,900	85,900	86,400	63,600 (thru Sept)

At its March 1986 briefing, CPSC staff presented an analysis of all ATV-related injuries treated in a representative national sample of hospital emergency rooms from May 1 to July 15, 1985. Among the findings --

- 53% of the accidents occurred at speeds under 15 mph;
- 68% of the ATVs hit a terrain irregularity or larger obstacle during the sequence of events leading to the injury;
- 20% of the accidents occurred during turning;
- 41% of the accidents were classified as the vehicle overturning; in 24% the vehicle rolled sideways; in 10% it flipped backwards; in 7% it flipped forward; and in another 7% it tipped, but did not overturn;
- 28% of the ATVs landed on the injured person;
- 18% of the injured persons were under 12 years old; 48% under 16 years;
- 36% of the drivers wore no protective equipment; 64% wore some equipment: helmets (37%), gloves (13%), heavy boots (12%), goggles (8%);
- 58% of the drivers had at least one year's experience; 29% had less than one month's experience.

(over)

DEATHS: CPSC has documented reports of at least 883 ATV-related deaths occurring in the 5 1/2-year period between 1982 and July 1987; 772 of those fatalities occurred in just the past 3 1/2 years:

Year:	1982	1983	1984	1985	1986*	1987**(Thru July)
Deaths:	26	85	153	246	268	105

The fatality toll is incomplete both for 1986, and especially for the first seven months of 1987. For these periods, death certificates from the states will continue to come to CPSC attention throughout all of 1987 and 1988. Of all known fatalities, 377 victims (43%) were under age 16, and 169 victims (19%) were under age 12.

3-wheel ATVs were involved in 78% of the 883 deaths reported to date; 4-wheelers, 19%; for more than 2% of the fatalities, the type of ATV was unknown as yet. States reporting the most ATV fatalities are:

California - 67
New York - 59
Michigan - 46
Wisconsin - 45
Pennsylvania - 44
Arkansas - 39
Minnesota - 33
Louisiana - 31
Florida - 29
Alaska - 28
Texas - 28
Mississippi - 27
Tennessee - 27
Ohio - 22
Alabama - 19
Illinois - 19
Utah - 19
N. Carolina - 19
Missouri - 19
Indiana - 18
Arizona - 17
Washington - 16
W. Virginia - 16
Kansas - 15
Virginia - 14
Maine - 12
New Mexico - 12
N. Dakota - 12
Kentucky - 12
Iowa - 11
Massachusetts - 11
Oregon - 10
New Hampshire - 10
Georgia - 10

REGULATORY STATUS: On December 12, 1986, by unanimous vote, the CPSC determined in a closed session enforcement meeting that ATVs presented an "imminent hazard" under Section 12 of the Consumer Product Safety Act (CPSA), and by a vote of 2-1 determined that the degree of hazard warranted: a refund program (recall) for all of 3-wheel ATVs; a refund program (recall) for 4-wheel ATVs used by children under 16 years of age; extensive notice of the risk and warnings by manufacturers to past, present, and prospective ATV owners and users; and extensive free training to be furnished by the industry to past and prospective purchasers and/or users in the purchaser's immediate family. In early February 1987, pursuant to the CPSA, the Commission sought representation from the U.S. Department of Justice (DOJ) in bringing a civil action in Federal District Court to enforce its decision.

Several months prior to the CPSC's enforcement decision, on July 16, 1986 the Committee on Government Operations of the U.S. House of Representatives, reporting on its ATV inquiry (House Report 99-678 99th Cong., 2d Sess.), concluded that 3-wheel ATVs present both "an unreasonable and imminent risk of death and serious injury requiring immediate enforcement action by the CPSC," including a recall of all 3-wheeled ATVs and a ban on future production. On October 2, 1987, in a supplemental report (House Report 100-335, 100th Cong., 1st Sess.), the Committee reiterated its concerns about the hazards associated with 3-wheel ATVs; cited the "unconscionable delay" by the DOJ in filing the enforcement action under Section 12 of the CPSA, as voted by the CPSC on December 12, 1986, and urged immediate action by DOJ in view of the large number of ATV deaths and injuries during that delay.

Finally, on December 30, 1987, the DOJ and CPSC jointly announced a negotiated settlement with the ATV industry which included a program of warnings, information about the risks, hands-on-training, and a halt in further sales of 3-wheelers still in dealer inventories. Notably absent was any recall or repurchase of the 1.5 million 3-wheeled ATVs in use, or for 4-wheeled ATVs purchased for children under 16. This agreement was filed as a preliminary consent order in Federal District Court in D.C., along with a strongly-worded 11-page DOJ complaint identifying ATVs as an "imminent and unreasonable risk of death and severe personal injury."

* Incomplete   ** Very Incomplete

Mr. **Barnard**. Thank you very much.

Mr. Pittle, in your experience as Chairman of the Consumer Product Safety Commission, have you ever run into an experience like this before, where the Justice Department would issue a complaint, and then immediately seek a settlement?

Mr. **Pittle**. For the record, I was Acting Chairman at the time when the current administration took over. When we dealt with Justice in the past over the years, we would ask them to seek whatever remedy I can think of that we had hoped to get. I don't ever remember anyone walking in and handing me down a settlement and saying, "Here it is." If that is what happened, no. That is not something I ever experienced. I am not even sure—I don't know what happened in this case.

Mr. **Barnard**. Did you get any discouragement from the Justice Department from time to time as to the cost or the possibilities of the success of litigation?

Mr. **Pittle**. I never heard the subject discussed. In the sense if there was a safety matter to deal with, I wouldn't suspect the Justice Department would say to me, "It is going to cost too much to bring the case," if that is what you are referring to, because that is what the role of the agency is, if it is going to be a long drawn out affair and we believe it is the proper thing to do in following the mandate of the act.

What I would do is come back to Congress, seek a special appropriation, and say to you, "I am trying to carry out the mandate you gave us, and it is going to cost a lot of extra money, and we need a special appropriation for that." I don't remember ever having the Justice Department assess a fee to its clients, if that is the point you are trying to make.

On the other hand, you constantly get advice from whoever your lawyers are, whether it is the Commission lawyers or Justice Department lawyers, assessing the likelihood of prevailing in the suit you want to bring. They will tell you you have got a good chance of prevailing, a slim chance of prevailing. Lawyers have many hands, and they keep saying on this hand, on that hand, on one hand and the other.

So as an agency decisionmaker, it would be my responsibility as one of the group to listen to those arguments and decide what would be the best way to go to bring about the action we feel is necessary. That is a Commission decision. It doesn't go to any one person, it goes to the group.

Mr. **Barnard**. Mr. Statler, there have been some suggestions about a refund, a less drastic recommendation than a complete recall. What is your opinion of including in this settlement, even though it is flawed in many, many areas I think, as you do, that at least a refund be available to those parents who want to return the ATV's? Personally I don't think that is going to resolve the entire problem. Do you think that would be anywhere near an acceptable provision in this settlement?

Mr. **Statler**. I do indeed, Mr. Chairman. That is my position. And this is partly in response to Mr. Craig's previous question also, I don't think there is any way of forcing consumers to return something they don't want to return, and I certainly wouldn't advocate that.

Typically the Government orders a recall, or an industry or manufacturers voluntarily decide to recall the product. As many consumers as want to return that product—or in the case of an automobile, to have the product repaired—they bring them in, they return them. There are always going to be some people out there who don't want to be bothered, or for whatever reason they may want to keep the product. They are going to keep it, and no one that I know of is advocating that the Government do anything further. No one is seriously urging that Government authorities go through their homes and search out that product, seize it, or anything else. I had not heard that.

Mr. **Barnard**. We are not saying it is against the law to keep them, we are not forcing parents to turn them in. In other words, you do agree that would be a modest——

Mr. **Statler**. I do, and I think further, with respect to those many people out there who might want to keep their ATV's, I think the real issue is do they want a dangerous and defective three-wheel ATV by virtue of its design. Or would they want a vehicle that I think all people in this discussion would agree is a more stable vehicle, namely the four-wheeler which, with the appropriate warnings, with the appropriate training, with the appropriate age qualifications and the rest, might be in the realm of a reasonably safe product.

And so if the people owning three-wheelers were given the alternative of turning them in in return for or for credit toward a four-wheeler, I think you get a much greater percentage of return that would help to enhance the safety situation.

Mr. **Barnard**. Would you like to respond to that?

Mr. **Pittle**. Yes. It has been a long time before I sat alongside my former colleague, and I hesitate to reach so quickly a moment of disagreement. I have an opinion about the inherent safety of the four-wheel product. I think there is every reason to believe while they have improved in some respects, the hazard is as great as the three-wheeler.

I would like to address something you mentioned a minute ago. I think it is probably useful, at least for me anyway, in the discussion to talk about recall as recalling the risk, because the recall really is not a thing, it is a process by which you try to remove the consumer from the risk, and you can do that by either repairing the product or replacing the product or offering a refund so that the consumer returns the product. But whatever it is, it is all under the general thing called recall.

And so when one manufacturer offered a partial replacement cost/benefit to the consumer, that was an enticement to get rid of the three-wheeler that they had. So it isn't clear it has to be just cash, although in this case I doubt very much, I don't think you could repair it, but they could offer, for example, to replace it with a different kind of vehicle altogether, like 10-speed bicycles. They might say turn it in and we will give you 3 10-speed bicycles, or something else if the retailer happens to sell those products. But whatever it is, it could not be anything other than an offering that the consumer then would have the choice to accept or not.

And why I feel that is so important is that the industry would have, as well as the Government, made, taken their best shot at trying to remove the consumer from a risky situation, but by not making that offer, by resisting that offer, by simply blaming the consumer for misusing this product and letting the continued death and injury rate go on is the part I find most troubling.

Mr. Barnard. If the Government seal of approval is on this settlement, does that in your opinion add to the usefulness to defense lawyers in private litigation brought in these cases?

Mr. Pittle. I happen to believe it is not either/or. If the Government sought recall and didn't get it and the Government had an agreement that only said we are going to stop selling the remains of the three wheels in the distribution chain, and that is all, I think that is a plus. It is not a big plus, but it is a plus. And without any provisions in there to carry out education programs and give warnings, I don't think manufacturers are just going to, OK, I am not going to educate people, I am not going to warn people, I think they got enough pressures in the product liability arena, they are going to do their best to educate and warn.

My problem is, and having the Government sign onto this, legitimizing this is a fix for a very serious problem, because even though there might be a statement on there that says this is not a waiver of responsibility and so on, I can't imagine that some defense lawyer in some other State is going to hold it up and say, you signed all these different things as well as the Federal Government endorsed this as the program that was the adequate solution for this problem.

And I think that will only enhance the manufacturers' protection. They will look more reasonable because the Federal Government endorsed this. I don't think the Government should be endorsing this. They shouldn't be endorsing how to protect the manufacturer, they should be fighting for protection of the consumer.

Mr. Barnard. Mr. Statler.

Mr. Statler. I would subscribe to everything Commissioner Pittle said in that respect. I do believe that there is a danger of certain States being, in effect, preempted from legislating on their own.

As Mr. Craig has indicated, they do have a responsibility. But I would agree with you, Mr. Chairman, that they may be preempted by virtue of the fact that the Federal Government has already, in effect, endorsed a so-called solution which, as the testimony this morning points out, is not a solution at all. And when it comes to the so-called release that Senator D'Amato identified in far more vivid terms than I possibly could, I think I would have to agree that, in terms of future litigation, that release, those disclaimers are going to have a major impact. For those consumers who decided on their own, whether informed appropriately or not, to continue using either three-wheelers or four-wheelers sold in the future, if they have an accident, their chances of successfully recovering from their injuries are appreciably diminished. The statement they have subscribed to that "I won't drive at excessive speed," whatever that means, that "I will be careful when approaching turns or hills" or anything else, those signed statements, come hell or high water, are going to be used against them in that litigation.

Mr. Barnard. Mr. Craig.

Mr. Craig. Thank you very much, Mr. Chairman, Mr. Pittle, Mr. Statler. Mr. Statler, it is good to have you back before the committee. A couple questions, Mr. Chairman, of Mr. Pittle.

In the course of your experience and your tenure at CPSC, how many of the efforts that your Commission put forward, whether they be mandatory standards or actions banning hazardous products, were ultimately tried in the court?

Mr. Pittle. I am glad you brought that up. I only wish I had known you were going to bring it up before I flew down from New York this morning, because that is probably one of the—that is a typical example of unrepresentative and misleading information Mr. Scanlon has publicized rather widely.

The Commission, during the 9 years I was there, promulgated—I am going to pick a number which is going to be plus or minus—in the neighborhood of 45 to 50 rules and regulations, bans of standards, hundreds and hundreds of rules, most of them of a voluntary nature.

Mr. Craig. You said voluntary.

Mr. Pittle. Let's get clear about something called voluntary. If the Government says to the company, "You have got a serious problem here and we are going to go before an administrative law judge and order a recall" and the company realizes there is going to be a lot of attendant publicity and the rest of it, the company says, "I am going to do the recall"——

Mr. Craig. In other words, you blackmail them into it?

Mr. Pittle. No, we use the authority you gave us to bring about a safer marketplace for the consumer.

Mr. Craig. Is that true of GM, they went to court and won?

Mr. Pittle. I knew nothing about GM at that time.

Mr. Craig. You were not at the Consumer Product Safety Commission at that time?

Mr. Pittle. No.

Mr. Craig. You are correct. I am in error.

Mr. Pittle. The point is, most of the standards promulgated under the Consumer Product Safety Act were indeed challenged by manufacturers in court, and some of them were altered, a couple of them were basically gutted, strengthened, but the vast majority of the regulations that we promulgated under the Hazardous Substance Act, under the Poison Prevention—there are three P's, Poison Prevention Packaging Act—all of those went through, and today children are not burning up in pajamas, and children are not drinking lye because the containers have child-resistant closures on them. All those things were not challenged, and they were rules and regulations promulgated by that agency.

What is misleading and unrepresentative is to select several of those rules and regulations that were promulgated under one of the several acts we administered and hold that up as if to say every time you regulate, somehow you are going to go to court, you are going to lose, and it is better to take a slice out of the loaf now voluntarily. That simply is categorically wrong.

Mr. Craig. Well, but the facts seem to bear out that in many cases those decisions made by you were in fact overturned. You just admitted that.

Mr. Pittle. No, the facts bear out a few of the cases were altered, and two of them were overturned out of 50 or more.

Mr. Craig. We will debate that.

Mr. Pittle. Let me argue——

Mr. Craig. Let me ask you this question.

Mr. Pittle. Sure.

Mr. Craig. Sitting as the Chairman of the Commission, hypothetically, you decide on a decision, you hand it over to Justice, Justice mulls it around, looks it over, comes back to you and collectively every attorney in the room says: "It appears to us based on our best knowledge that we can't win this." What would you do then?

Mr. Pittle. Well, I would ask them whether they would win it.

Mr. Craig. You seek advice from attorneys, and their advice to you is on your chances of winning this in court are probably close to "nil" at best.

Mr. Pittle. OK.

Mr. Craig. What would you do then?

Mr. Pittle. Under that hypothetical case, which I don't believe that is the case here of the ATV's, under that hypothetical case, what I would do would be to talk to the other Commissioners and say, "Do you want to push forward anyway?" For reasons—because those lawsuits have an unpredictable air about them. If we said, "No, that is going to take too long and produce nothing, so let's go to our Oversight Committee and seek relief," because I feel an obligation to tell my Oversight Committee that here is a case that has one of the most hazardous products the Commission has ever had to study, the law doesn't provide the remedy to the Congress——

Mr. Craig. You would not move toward a solution yourself, you would go for a legislative route.

Mr. Pittle. I would do something besides sit there and take a warning verification problem that is affixed. I would publicize to my Oversight Chairman I need legislative remedy, but that hypothetical is so far to the extreme, sir, I don't——

Mr. Craig. We will find out it is to the extreme. I think the facts in time will probably bear me out.

The waiver form that Senator D'Amato held up, and both of you seem to address that as being of little value, and I guess misleading—isn't that the word you used—to the consumer?

Mr. Pittle. No, I said as a warning to the consumer, I find it is better than no warning, and it is a good thing to tell the consumer. My point of view is I don't believe that that warning will be made regardless of whether the Commission accepts this settlement agreement or not or at least if a manufacturer is prudent, they will warn the consumer.

Mr. Craig. I may have misunderstood you. I thought my notes bore out your thought or you did agree with Senator D'Amato it was misrepresented.

Mr. Pittle. No, what I said was I thought it was inadequate as a real warning, as a warning to say to a parent—and remember——

Mr. Craig. Do you believe it protects the manufacturers from certain liability?

Mr. PITTLE. I think it will help insulate the manufacturer. I don't believe it will dispose of his liability. I think it will add to his defense.

Mr. CRAIG. I think that it is a valuable point, because that particular form that was held up has been used by a manufacturer for nearly 3 years, and he has all kinds of suits against him, so it does not protect the manufacturer. I think we can—I think that it is an important thing to say for the record. I think it is important to say that does by saying "Here are the things thou shalt not do as an operator," and you are going to sign them, maybe helps more than just having them in a manual stuck in the tool box of one of the operators operating units.

Mr. PITTLE. I think you made a good point there. My concern is not the piece of paper or the way they are written. Personally, I think they are inadequate because they are not specific and kind of pabulum, but my concern is having the Federal Government sign on the bottom line an agreement that endorses this as part of a fix to a problem. I don't think——

Mr. CRAIG. Was it the only fix or was it one of eight or nine?

Mr. PITTLE. Whatever it is, it itself will add to the manufacturers' defense just to have the CPSC seal of approval on it, and I don't think that that will do the consumer any good.

Mr. CRAIG. I am glad we clarified that. I didn't understand your position before. I think it is clear now. I am not going to take issue with you if that is how you feel about it. I think it is important to show, though, it does not waive the manufacturers' liability.

Mr. PITTLE. No.

Mr. CRAIG. I think that point was attempted to be made this morning by some, if not by you, certainly it is important that we clarify that.

Mr. Statler, can you tell me about A.T. Kearney, what do you do in your new role?

Mr. STATLER. I am vice president of the company and a partner in charge of their risk avoidance and product liability practice.

Mr. CRAIG. And in that role, what do you do?

Mr. STATLER. I advise companies, both in connection with problems relating to products, problems relating to possible recalls or real recalls, as well as problems relating to the byproducts that impact on our environment. I advise them as to how best to manage the risks associated with those products and byproducts.

Mr. CRAIG. What would be a typical type of company you would be working with?

Mr. STATLER. Typically, we work with a lot of the Fortune 1,000 companies, advising them in an overall sense on management problems, and in my specific area, with respect to risks associated with products and the environment.

Mr. CRAIG. Do you have as a client any ATV manufacturer?

Mr. STATLER. I do.

Mr. CRAIG. What do you do for them?

Mr. STATLER. I have advised one company, the Polaris Co., whose name has been mentioned today, in connection with ways in which they might better manage the risks associated with their continued production of four-wheeled ATV's.

Mr. CRAIG. Do you advise any of the victims of ATV's in your current status, or just the manufacturers of the products?

Mr. STATLER. I have never talked to a victim that I can recall. I have been subpoenaed and ordered by the court in two cases to be deposed in ATV cases.

Mr. CRAIG. I was just curious how you were making your living now. Now we know. I don't believe I have any other questions of these gentlemen.

Thank you.

Mr. BARNARD. Thank you very much for being here. Both of you made very excellent witnesses. It is very interesting to get your evaluation of this matter at this particular time, and it has been very helpful. Thank you very much for coming.

The committee will be in recess for about 15 minutes, just 15 minutes, so please, witnesses, don't leave.

[Recess.]

Mr. BARNARD. The subcommittee will please come to order.

Our next panel this morning—I would like to ask staff if they would please ask the witness to come in from outside.

Mr. CRAIG. Mr. Chairman, I would ask unanimous consent that a series of correspondence between Senator D'Amato and Commissioner Scanlon be entered into the record. Mr. D'Amato referred to that correspondence this morning in his testimony. It is available, and I think it would be insightful for the record to have it.

Mr. BARNARD. Do you have any particular place you would like to insert it in the record?

Mr. CRAIG. Following the testimony of Members of Congress would be appropriate.

Mr. BARNARD. Without objection, so ordered.

[The information may be found on p. 49.]

Mr. BARNARD. This morning our next panel consists of Mr. James McFadden, a parent; Ms. Bonnie Sumner, a parent; and Dr. Richard Narkewicz—how did I do on that?

Dr. NARKEWICZ. You did fine.

Mr. BARNARD. We are delighted to have you this morning and appreciate very much your being here and offering testimony which we think will be important in the consideration of this matter.

Let me say at the outset to those of you who suffered losses and injuries in your family that we certainly are sympathetic, and we do appreciate your being here this morning and testifying.

We will first hear this morning from Mr. James McFadden, from Omaha, NE. Mr. McFadden has already been introduced by his Congressman, Congressman Daub, and we will hear from you first, and then we will hear from Ms. Sumner and Dr. Narkewicz.

Mr. McFadden.

STATEMENT OF JAMES McFADDEN, PARENT, OMAHA, NE

Mr. McFADDEN. Thank you. If you will allow me as I speak, I would like to display a portrait of my little boy.

Mr. BARNARD. That would be fine. How old was he?

Mr. McFADDEN. He was 9 years, 7 months and 28 days old. This is my wife, Deb. I would like to start by saying that we have come here at a time of tremendous personal grief on behalf of my little boy, Joseph. Joseph couldn't be here today. He was run down by a three-wheel ATV on January 18, 10 or 11 days ago. Joseph died the evening of January 16 from severe head damage.

Joseph was my buddy. He was born on September 18, 1979, on our third wedding anniversary. He was my first child, my only son. Joseph went to God when he was 8 years, 3 months, and 28 days old. Joseph leaves his mommy and daddy and two little sisters to mourn his loss.

I want to take a minute to tell you about my buddy. He was in the third grade at St. Joan of Arc Catholic School in Omaha, NE. He was a Cub Scout for the past 2 years, and he so dearly loved to ski.

Joseph learned to ski when he was 6 years old. He had been skiing in Colorado on four different occasions in the past 3 years. Christmas week, he and I skied the advanced slopes together. As a reward of excellence in his school work, I enrolled Joseph in a local ski club in the Omaha area. They took him on a bus to a local ski hill in Iowa for lessons on more advanced techniques.

Joseph was standing on skis near the base of the hill, in a stationary position, when a three-wheel Honda 250cc ATV struck him down. The ATV was driven by a volunteer with the National Ski Patrol Association. The 34-year-old driver was heading up hill. The terrain was open and flat, the night was clear, and the area was lighted. The force of the collision was tremendous.

My son was airlifted to an Omaha hospital. He was unconscious and had difficulty breathing.

After 12 hours, his neurologist told us to pray, that it was impossible, and that our baby was brain dead. He asked Joseph's mom and I to agree to do nothing heroic, to not restart his heart if it failed.

Deb and I couldn't make that decision. We prayed and we cried. We called in his pastor and sister that ran the school, and they prayed with us. His mommy and daddy and pastor and sister, we gave him last rights together. We held his hand, and we asked for God's help.

In the end, we asked God to hold our baby in His arms and to take him to heaven. Joseph died Saturday night, January 16, 28 hours after he was struck. His mommy and I held him, we watched his blood pressure go away, and we watched his heart tick down to zero.

I have never known pain this deep. I didn't suspect it was even possible. A very, very terrible pain is inside the both of us. A very piece of our hearts and souls has been so terribly wounded. My buddy was buried on Wednesday with over 1,000 of his friends attending the Mass. The children's choir sang, his Cub Scout pack awarded him his bear badge, something he was working so very, very hard for.

I find the recent legislation concerning ATV's just incredible. There are no special laws concerning drug or blood testing. The driver was not tested at the scene. There are no standards for equipment. This vehicle had no siren, no flashing lights, it didn't even have a horn. There are no rules concerning safe operation. There were no set speed limits. In fact, this vehicle did not have a speedometer. This vehicle was hard to handle, capable of going in excess of 40 miles an hour, it was operated on an icy, snowy hill where the driver either ran my son down directly or went out of control and slid into him.

At the present time, an Iowa grand jury is examining the evidence to determine if criminal charges are in order in the case of my son.

Prior public opinion has focused on children who drive ATV's and are maimed or killed in accidents. I am here to ask you to consider another perspective on the issue, something you can relate to especially if you have children or grandchildren. Three-wheeled ATV's and four-wheeled ATV's should be banned from any public or private use location where a child can be injured or killed, as Joseph was. These vehicles shouldn't be used where kids play. These vehicles shouldn't be used where people ski. They are motorized vehicles that people don't expect. They have too much speed. They have no warning devices.

Frankly, from what I have read of the Justice Department's settlement, nothing is done to reduce the number of vehicles that are in the public's hands. I am afraid nothing has been done by the Justice Department or even yet by Congress to prevent further accidents like the one to my son, Joseph.

If the legislature had been more responsive instead of shortsighted in favor of the manufacturers, Joseph and I would be tickling each other tonight, perhaps wrestling a little bit. I would get a kiss goodnight tonight. He would kiss his mommy and would say his prayers to God tonight. The announcement of the consent decree came exactly 1 week before my buddy went to heaven. Joseph's mommy and daddy ask with all our hearts to please take immediate corrective steps, don't let this sit for another year or two. When you hug your children or grandchildren tonight, think of my buddy and vote with your hearts to save your children.

Thank you.

Mr. BARNARD. Thank you very much for being here this morning. Surely I speak for both Mr. Craig, myself, and other members of this committee in extending you and Mrs. McFadden our deepest sympathy on the passing of your son. It is exceedingly brave and courageous for you to come here today after such a short period of time and offer this testimony, and we appreciate very much your coming, and certainly it will be of value to us in our evaluations. Thank you very much.

Mr. Craig.

Mr. CRAIG. Mr. Chairman, let me echo that same sentiment. I have read the account of the accident and your son's death, and I can't feel for you because I have never been faced with that kind of circumstance to feel the depth of it. I think it is important to say that the articles referred to a criminal liability issue instead of a product liability issue, and I think it is important for this record to show that.

I am a skier. I have been on a lot of slopes. The equipment designed for ski slopes have warning devices and flashing lights on them, as you suggested. The Bombardiers and Snow Cats that are used to groom the slopes of our Nation's ski areas, because of a concern very similar to the one that you have been victimized by, have those lights and those sirens and all of those safety devices to make them visible both on a clear day or night and/or in a snowy, stormy situation.

That three wheeler that you referred to was not designed to be used on an occupied active ski slope, and I doubt that any manufacturer would step forward and try to justify its existence there for the purpose it was being used. I think that is very important for the record. Because it just simply is a fact, in my opinion. And I think I [illegible] to [illegible] as [illegible] in a [illegible] circumstance such as have happened to me or my family.

Thank you.

Mr. McFadden. If I may make one additional comment on that, I imagine it probably will take a while to sort through all of the details because Bob and I, as of tonight, still don't know all of the circumstances surrounding our son's death, but for some reason the National Ski Patrol Association, which is based out of Denver, CO, and they have volunteers on all the slopes all over the country, for some reason they feel that due to things they have read or decisions they have made in the past, ATV's are indeed safe for use on slopes, that they can provide some training, and it is up to the discretionary judgment of each slope to decide whether or not to use them.

And that is a misconception that the public needs to understand, and they need to understand that simply being in a public place where they are used puts them at risk.

Mr. Coats. Thank you for that observation. I appreciate it.

[The prepared statement of Mr. McFadden follows:]

Statement
for delivery on
January 28, 1988
U.S. House of Representatives
Committee on Goverment Operations
Subcommittee on Commerce, Consumer and Monetary Affairs
Hon. Douglas Barnard, (Dem-Ga) Chairman
Room 2154 Rayburn House Office Building
Washington, D.C.

delivered by
James J. McFadden
Residence: 3012 South 94th Street
Omaha, Nebraska 68124
(402) 392-2943
Office: 11711 Arbor St., Suite 240
(402) 330-6282

My name is James McFadden. This is my wife, Deb. We have come here, at a time of great personal grief, on behalf of our son Joseph. Joseph could not be here today. He was run down by a 3-wheel ATV on January 15, and he died the evening of January 16.

Joseph was my buddy, born on September 18, 1979, on our third wedding anniversary. Joseph went to GOD when he was 8 years, 3 months and 28 days old. Joseph leaves his mommy and daddy and two little sisters to mourn his loss.

I want to take a minute to tell you about my buddy. He was in the 3rd grade at St. Joan of Arc Catholic school in Omaha, Nebraska. Joseph was an A student, he was a cub scout for the past 2 years, and he so dearly loved to ski.

Joseph learned to ski when he was 6. He had been skiing in Colorado on 4 different occasions in the past 3 years. Christmas week he skied the advanced slopes with me. As a reward of excellence in his schoolwork, I enrolled him in a local ski club. They took him on a bus to a local ski hill in Iowa for lessons on more advanced techniques.

Joseph was standing on skis near the base of the hill, in a stationary position, when a 3-wheel Honda 250cc ATV struck him down. The ATV was driven by a volunteer with the National Ski

Patrol Association. The 34 year old driver was heading up hill. The terrain was open and flat, the night was clear, and the area was lighted. The force of the collision was tremendous.

My son was airlifted to an Omaha hospital. He was unconscious and had difficulty breathing.

After 12 hours, his neurologist told us to pray, that it was impossible, and that our baby was brain dead. He asked Joseph's mom and I to agree to do nothing heroic, to not restart his heart if it failed.

Deb and I could not make that decision. We prayed and we cried. His pastor and the sister that runs his school prayed with us. His mommy and daddy and pastor and sister gave him the Last Rites. We held his hand and asked for GOD's help. In the end we asked GOD to hold our baby in HIS arms and take him to heaven.

Joseph died Saturday night, January 16, as his mommy and I held him and watched his blood pressure drop and his heart tick down to zero.

I have never known pain this deep, nor did I suspect that it was possible. A terrible pain is inside of us. A piece of our very hearts and souls have been so terribly wounded.

My buddy was buried on Wednesday, with over a thousand of his friends attending the Mass. The children's choir sang, his cub scout pack awarded him his bear badge, the next rank he had been working so hard for.

I find the recent legislation concerning the ATVs incredible.

There are no special laws concerning drug or blood testing. The driver was not tested at the scene.

There are no standards for equipment. This vehicle had no siren, flashing lights, or even a horn.

There are no rules concerning safe operation.

There were no set speed limits, in fact, there was no speedometer on the ATV.

This vehicle was hard to handle, capable of going in excess of 40mph, and was operated on a icy snowy hill where the driver either ran down my son directly or lost control and slid into him.

An Iowa grand jury is examining the evidence to determine if a criminal charge is in order in my son's case.

Prior public opinion had focused on children who drive ATVs and are maimed or killed in accidents. I am here to ask you to consider another prospective on the issue. One you can relate to if you have children or grandchildren.

3-wheel ATVs and 4-wheel ATVs should be immediately banned from any public or private use location where a child can be injured or killed as Joseph was. These vehicles should not be used where there are kids playing. They should not be used where people ski. 3-wheelers are motorized vehicles which people do not expect. They have too much speed. They have no warning devices. Frankly, from what I have read of the Justice Department settlement, nothing is done to reduce the number of ATV vehicles.

I am afraid nothing has been done by the Justice Department, or yet done by the Congress, to prevent further accidents like the one to my son Joseph.

If the legislature had been more responsible, instead of shortsighted in favor of the manufacturers, Joseph and I would be tickling each other tonight, perhaps wrestling a little. He would give me a kiss goodnight. He would be here to kiss his mommy and say his prayers to GOD tonight.

The announcement of your 3-wheel ATV legislation came just one week before my buddy went to heaven.

Joseph's mommy and daddy ask with all our hearts to please take immediate corrective steps. When you hug your children or grandchildren tonight, please think of my buddy. Please vote with your hearts to save your children from harm.

Additional information, contact:

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Omaha, Nebraska 68102
(402) 342-0100

Mr. **Barnard**. We are going to hear from Ms. Bonnie Sumner of Milwaukee, WI.

STATEMENT OF BONNIE SUMNER, PARENT, MILWAUKEE, WI

Ms. **Sumner**. Thank you. It is going to take me a minute. I am a former teacher, and I always believed in visual aids, so I brought some pictures with me. Those are pictures of my son, Noah. The black and white pictures were taken before his accident, the colored pictures were taken that night.

I have submitted a written statement that I would like to be included in the record, because I may forget to say some of the things. First of all, Mr. Chairman, I would like to thank you for holding a hearing on this important and timely issue. I unfortunately have reason to know about the human tragedy that these vehicles can cause. I had never seen an all-terrain vehicle before July 15, 1984; now, they are the stuff of my nightmares. My family was visiting acquaintances at their lakefront home on that beautiful, but windy, day. It was so windy, in fact, that we told our son, Noah, then 14, that he could not go sailing because it might be too dangerous. How ironic that now seems, considering what later occurred.

The family we were visiting had 1 month before purchased a Honda ATV for their 14-year-old son. The boys asked permission to ride the ATV up and back the mile-long, smooth, paved driveway. I emphasize the words "smooth" and "paved" because anyone who knows anything at all about ATV's knows that they are never to be ridden on a smooth surface. I knew absolutely nothing about these vehicles 3½ years ago, and there was no warning sticker or other indication to alert us to their true menace. As I have already stated, I had never seen an ATV before that day. My first perception of the vehicle was that it was a cross between a "Big Wheel" and a golf cart. It looked stable, slow, and safe. I have always been accused by my children of being an overly cautious parent; in this case, however, I saw no reason to worry about my child riding an ATV.

My husband and I and the two other adults present went off with the younger children, and the two boys began their back and forth rides. On his last trip, Noah went up the driveway and never came back. When the other boy went to look for him, he found our son in the woods at the side of the driveway, unconscious, with the vehicle on top of him and a branch sticking out of his mouth. The men were called, they pulled the vehicle off him, and gently removed the branch while the ambulance was called.

That accident has been the cause of many interminable moments in my life, the first being the wait for the ambulance to arrive. What was probably 5 minutes seemed like an eternity. I couldn't take my eyes off my son's broken and bleeding body. I was sure that he would never regain consciousness, and would die before the ambulance arrived. He was taken to a local hospital where they told us that either his head injuries or the damage to his spleen could cause his death. His condition was stabilized as much as possible and a doctor was sent in the ambulance to keep him alive during the 45-minute trip to Childrens' Hospital in Milwaukee. My husband went in the ambulance, and I drove home with our three younger children so that I could arrange for their care.

When I arrived at Childrens' Hospital, Noah was in the radiology department, where he remained until about 2 a.m. Neither the neurosurgeon nor the radiologist who had performed the CAT scan was encouraging. That night, the second in the long line of interminable moments, we were told of some of the possibilities that our bright, handsome son faced in the future. These ranged from death, to never regaining consciousness, to being a quadriplegic, to living as a vegetable, to experiencing seizures, to experiencing future learning disabilities and emotional problems. That night was the first of 30 nights that either I or my husband would spend at Childrens' Hospital.

Noah's coma was intentionally maintained by drugs to prevent his brain from additional swelling and further aggravating his injuries. At this time, a hole was drilled in his skull to allow placement of a pressure monitor. He was sent up to the intensive care unit, where he remained for about a week. During that period, his brain activity was closely monitored. My husband and I sat for hours, both our eyes glued to the digital readout of the device monitoring the pressure inside our son's skull. We felt almost as if, by some magic, our thoughts could trigger the right numbers, that is, the numbers on the machine that would indicate decreased swelling.

One of the periodic CAT scans he was given showed a clot between the skull and the brain. Again, for the second time in 2 weeks, this child, who had never even had his tonsils removed, was undergoing open-skull surgery. Either my husband or I sat at his side 24 hours a day, fearful that he might die and one of us would not be there. No one could assure us that when he was taken off the coma-inducing drug he would regain consciousness. Although he was in a coma, we didn't know if he could hear or feel, so we talked to him and touched him constantly, even though he didn't respond. When he was taken off the coma-inducing drug, he regained consciousness and slowly became more aware of his surroundings. He was then moved from intensive to intermediate care.

As Noah progressed, he was moved from intermediate care to a private room. One of our jobs was to see that he walked up and down the halls at least twice a day to aid his respiration and to help regain muscle tone. Some of the lesser injuries began to become more painful at that point. His mouth was still swollen and tender where the teeth had been knocked out, and his jawbone pulverized. His broken collarbone and ribs made movement painful. He still had no bladder or bowel control. The continuous intravenous insertions and blood tests had made his arms and hands painful and swollen.

About 2 weeks after the accident, he began to complain of severe abdominal pain. Another CAT scan revealed that his spleen had reruptured and was bleeding into his abdominal cavity. He was rushed back to the intensive care unit, painfully aware of what was going on. At that point, we were given a choice.

In order to avoid surgical removal of his spleen, he had to remain still for at least another 2 weeks. This time, he could not be fully sedated because that would have interfered with the anesthetic that could become necessary at any time if the bleeding worsened and surgery became our only option. This began another phase of his hospitalization that truly can only be described as a nightmare. We were faced with a totally irrational, physically large child who could not be completely sedated, nor physically restrained in any way, but had to be kept still.

His brain injury made him irritable and hyperactive. He was given powerful drugs, such as Haldol and Thorizine, usually prescribed for schizophrenics, in an attempt to calm him down. Their side effect, however, was to cause extreme muscle spasms and constant, loud animal-like moans. I used all the tricks I had learned when my children were toddlers, and with a constant combination of threats and bribes we were able to keep him quiet and save his spleen. During this period there was not one but many an interminable moment when I thought both my husband and I would crack under the strain.

Noah was moved back down to a private room and after another stressful 2 weeks was judged ready to go home. Even after a month of this ordeal, I was very concerned about taking care of him at home. He was still rather irrational, and since his spleen was not totally healed, we had to monitor him carefully once we got home. Noah was discharged on August 15, 1984, exactly 1 month after the accident, with missing teeth, bone fragments in his gums, scars on his face and head, broken bones that were not completely healed, a precarious spleen, and a supply of both Valium and Thorizine to keep him tractable. While he was in the hospital, we had contact with over a dozen different doctors, at least 20 nurses, and other professionals, and left with bills amounting to over $60,000.

I slept in Noah's room with him for the first week because I didn't trust that he would not get up and walk away in the middle of the night. Noah started his freshman year of high school with facial scars, missing teeth, a shaved head, and some real disorientation. I attended class with him for weeks because I was afraid he would lose his bearings while changing rooms and would wander off.

During the next 2 years, Noah endured various problems, including painful oral surgery, some hair loss, and emotional difficulties. While we are grateful that he has made a recovery that will allow him to lead a normal life, we don't know the extent of the profound psychological and emotional damage that has been inflicted on him, and for that matter on us as well.

This accident has changed our lives forever. I have become much more fearful of everyday situations. There are certain memories of that time such as the sound of an ambulance's siren, or passing by Childrens' Hospital, that still, almost 4 years later, cause me to cry, and certainly testimony like that of the McFadden's would be part of it. If you multiply our experience by the number of victims of ATV-related accidents, it will give you some idea of the incredible damage these vehicles have done and are continuing to do.

I am here today because I harbor the somewhat naive, yet wonderfully optimistic notion that what I do can make a difference. Maybe the "little guy" doesn't have to just sit there and take it. I would like to believe that all the phone calls, letters and conversations that I have initiated on this subject in the past 3½ years, as well as my testimony before the Consumer Product Safety Commission in 1985, have in some small way helped to bring this issue to the public's attention.

I will not be able to stop my efforts until ATV's are not only regulated but also recalled so that in the future similarly unaware families will not suffer as we have. I would like to refer you to former Consumer Product Safety Commissioner Stuart M. Statler's testimony before this very subcommittee on May 21, 1985, which, as the saying goes, "says it all." There are lots of things he said then, almost 3 years ago, that I agree with, but I am not going to repeat them.

The horror for me is that, although his remarks were delivered 2½ years ago, the carnage continues and will in the future unless the Consumer Product Safety Commission, and especially Chairman Scanlon, stop worrying about Japanese companies and start worrying about American children.

I added this last night at 4 o'clock in the morning, because of a telephone conversation I had before I left home. I called Jim and Kathy Erickson of Anoka, MN, whose son, Chris, was injured on an ATV Christmas morning of 1984. I met Jim when we both testified before the CPSC hearing in Milwaukee. When I told Kathy on the phone I would be coming to Washington to testify before this committee, her voice breaking with tears, she blessed me for my efforts and pleaded with me to tell you that the devastation must stop.

Chris, who has been in a coma for 4 years, will not be helped by any decision that is reached, but other children and their families will be spared. Don't forget that you see one mother before you, but I represent thousands of families of victims. Although we are not formally organized, and we don't have big industry money behind us, we are the consumers and the citizens of this country who demand that you protect us properly.

[The prepared statement of Ms. Sumner follows:]

STATEMENT OF BONNIE SUMNER

BEFORE THE SUBCOMMITTEE ON COMMERCE, CONSUMER AND MONETARY AFFAIRS
COMMITTEE ON GOVERNMENT OPERATIONS

U.S. HOUSE OF REPRESENTATIVES

HEARING ON ALL-TERRAIN VEHICLES

Washington, D.C.
January 28, 1988

Mr. Chairman, I would like to thank you for holding a hearing on this important and timely issue. I unfortunately have reason to know about the human tragedy that these vehicles can cause.

I had never seen an all-terrain vehicle (ATV) before July 15, 1984; now, they are the stuff of my nightmares. My family was visiting acquaintances at their lakefront home on that beautiful, but windy, day. It was so windy, in fact, that we told our son Noah, then fourteen, that he could not go sailing because it might be too dangerous. How ironic that now seems, considering what later occurred.

The family we were visiting had, one month before, purchased a Honda ATV for their fourteen-year-old son. The boys asked permission to ride the ATV up and back the mile-long, smooth, paved driveway. I emphasize the words "smooth" and "paved" because anyone who knows anything at all about ATV's knows that they are never to be ridden on a smooth surface. Three-and-a-half years ago, I know absolutely nothing about these vehicles, and there was no warning sticker or other indication to alert us to their true menace. As I have already, stated, I had never seen an ATV before that day. My first perception of the vehicle was that it was a cross between a "Big Wheel" and a golf cart. It looked stable, slow and safe. I have always been accused by my children of being an overly cautious parent; in this case, however, I saw no reason to worry about my child riding an ATV.

My husband and I and the two other adults present went off with the younger children, and the two boys began their back-and-forth rides. On his last trip, Noah went up the driveway and never came back. When the other boy went to look for him, he found our son in the woods at the side of the driveway, unconscious, with the vehicle on top of him and a branch sticking out of his mouth. The men were called, they pulled the vehicle off him, and gently removed the branch while the ambulance was called.

That accident has been the cause of many interminable moment in my life, the first being the wait for the ambulance to arrive. What was probably five minutes seemed like an eternity. I couldn't take my eyes off my son's broken and bleeding body, and I was sure that he would never regain consciousness and would die before the ambulance arrived. He was taken to a local hospital where they told us that either his head injuries or the damage to his spleen could cause his death. His condition was stabilized as much as possible and a doctor was sent in the ambulance to keep him alive during the forty-five minute trip to Childrens' Hospital in Milwaukee. My husband went in the ambulance and I drove home with our three younger children so that I could arrange for their care.

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One of the periodic CAT scans he was given showed a clot between the skull and the brain. Again, for the second time in two weeks, this child, who had never even had his tonsils removed, was undergoing open-skull surgery. Either my husband or I sat at his side twenty-four hours a day, fearful that he might die and one of us would not be there. No one could assure us that when he was taken off the coma-inducing drug he would regain consciousness. Although he was in a coma, we didn't know if he could hear or feel, so we talked to him and touched him constantly, even though he didn't respond. When he was taken off the coma-inducing drug, he regained consciousness and slowly became more aware of his surroundings. He was then moved from intensive to intermediate care.

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About two weeks after the accident, he began to complain of severe abdominal pain. Another CAT scan revealed that his spleen had re-ruptured and was bleeding into his abdominal cavity. He was rushed back to the Intensive Care Unit, painfully aware of what was going on. At that point, we were given a choice.

In order to avoid surgical removal of his spleen, he had to remain still for at least another two weeks. This time, he could not be fully sedated because that would have interfered with the anesthetic that could become necessary at any time if the bleeding worsened and surgery became our only option. This began another phase of his hospitalization that truly can only be described as a nightmare. We were faced with a totally irrational, physically large child who could not be completely sedated, nor physically restrained in any way, but had to be kept still.

His brain injury made him irritable and hyperactive. He was given powerful drugs, such as Haldol and Thorizine, usually prescribed for schizophrenics, in an attempt to calm him down. Their side effect, however, was to cause extreme muscle spasms and constant, loud, animal-like moans. I used all the tricks I had learned when my children were toddlers, and with a constant combination of threats and bribes we were able to keep him quiet and save his spleen. During this period there was not one, but many an interminable moment, when I thought both my husband and I would crack under the strain.

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During the next two years, Noah endured various problems, including painful oral surgery, some hair loss, and emotional difficulties. While we are grateful that he has made a recovery that will allow him to lead a normal life, we don't know the extent of the profound psychological and emotional damage that has been inflicted on him, and, for that matter, on us as well.

This accident has changed our lives forever. I have become much more fearful of everyday situations. There are certain memories of that time such as the sound of an ambulance's siren, or passing by Childrens' Hospital, that still, almost four years later, cause me to tremble and weep. If you multiply our experience by the number of victims of ATV-related accidents, it will give you some idea of the incredible damage these vehicles have done, and are continuing to do.

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The horror for me is that, although his remarks were delivered three-and-a-half years ago, the carnage continues, and will in the future, unless the Consumer Product Safety Commission, and especially Chairman Scanlon, stop worrying about Japanese companies and start worrying about American children.

Mr. **Barnard**. Thank you very much.

We will now hear from Dr. Narkewicz, Richard Narkewicz, president of the American Academy of Pediatrics.

STATEMENT OF RICHARD NARKEWICZ, M.D., PRESIDENT, AMERICAN ACADEMY OF PEDIATRICS

Dr. **Narkewicz**. Thank you and good afternoon, Mr. Chairman. My name is Dr. Richard M. Narkewicz and I am a pediatrician. In fact, I am the president of the American Academy of Pediatrics and I am here today to represent the 34,000 pediatricians in this country who not only provide care for children but who maintain a longstanding and deep commitment to protect them from injuries.

It is with this commitment in mind, Mr. Chairman, and with the certain knowledge that American children would remain seriously imperiled by the recently announced preliminary consent decree on all-terrain vehicles that I submit these comments and criticisms.

I have not met these parents before, but the poignant testimony you have heard speaks to the issue. We share these parents' deep concern and grief in their loss. Unfortunately, as pediatricians, this is all too familiar a story.

Accounts of such tragedies have poured into the academy through our pediatricians who have suffered with families in similar circumstances. Our written testimony has detailed the litany of injuries.

We are not talking about scrapes and bruises and broken bones. We are talking about death, brain damage, severed spinal cords and permanent paralysis caused by ATV's in the hands of children.

ATV's are marketed as fun for the whole family. They are indeed killers and cripplers of children. Given the mounting rate of deaths and injuries that are attributed to ATV's—and we heard 20 deaths and 7,000 injuries a month today—we have tried to analyze the problem and propose a solution.

The ATV's, as we have heard, both three- and four-wheel models, are complex machines with a high center of gravity, meaning they tip over easily. They weigh in excess of 500 pounds and they can go up to 50 miles an hour. So if you fall off going at 50 miles an hour, you are in trouble and the machine may roll over on you.

Thus, even in the best hands they are unstable and take coordination, balance, sharp reflexes, perception and maturity of judgment to drive.

I think this is the key point I would like to make. Children under 16 accounted for about 50 percent of the deaths reported and half of these were under age 12.

As pediatricians, our experience in child development makes it clear that children lack the coordination, balance, reflections, perception and maturity of judgment to operate either three-wheel or four-wheel ATV's safely. In fact, they even lack the weight to counter-balance tipping over.

No labeling, no education, no training, no practice and no supervision will suffice to overcome this lack of developmental maturity. The morbidity and mortality rates simply will not substantially change as long as these vehicles are freely available to children.

Mr. Chairman, our proposal is clearly the only solution to the problems posed by the physical limitation of the machine and the driver, in this case, children. We must take these dangerous vehicles out of the hands of children. The present consent decree agreed upon by the Justice Department, Consumer Product Safety Commission, and the ATV manufacturers does not address either problem adequately.

In fact, it leaves 1.3 million three-wheel ATV's out there like ticking time bombs in the hands of our American children. So as pediatricians, we are bracing for more deaths and injuries to children well into the 1990's, unless something is done.

I ask all of you, how many more children and grandchildren must suffer death or disability before acceptable measures are taken?

How many more parents like these must we as pediatricians grieve with before the Government restricts the sale and use of ATV's to children under 16, and insists on a recall and rebate system to take out of circulation the vehicles that were marketed and sold to an unsuspecting parent of a child.

As you know, Mr. Chairman, the academy, along with other child health advocate groups, filed suit earlier this week to defer action on the preliminary consent decree until such time as all parties have an opportunity to make a case for the disservice done to children.

We believe ATV's are the most serious new product-related hazard to the health and well-being of American children and we offer you our vigorous support on pending legislation restricting ATV's broadly and efficaciously.

In conclusion, Mr. Chairman, we have been here before to underscore the urgent problem of addressing the dangers of ATV's in the hands of children. I promise you, I promise our parents, I promise our children and I promise the industry, the American Academy of Pediatrics will keep coming back again and again until the Government fulfills its responsibility by getting these extremely hazardous vehicles out of the hands of children.

No responsible pediatrician, no responsible parent and no responsible political leader should settle for anything else, and, Mr. Chairman, we deeply appreciate your unremitting efforts to that end.

I thank you very much, sir.

[The prepared statement of Dr. Narkewicz follows:]

American Academy of Pediatrics

TESTIMONY

BEFORE THE

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COMMERCE, CONSUMER, & MONETARY AFFAIRS

ON

ALL-TERRAIN VEHICLES

BY

RICHARD M. NARKEWICZ, M.D., F.A.A.P.

JANUARY 28, 1988

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Good morning, Mr. Chairman. My name is Richard M. Narkewicz, M.D., and I am president of the American Academy of Pediatrics, an international organization whose 34,000 pediatricians not only provide health care for children but share a longstanding and deep commitment to protect them from injuries. It is with this commitment in mind, and with the certain knowledge that American children would remain seriously imperiled by the recently announced preliminary consent decree on all-terrain vehicles (ATVs), that I submit these comments and criticisms.

We have been here before, Mr. Chairman, to underscore for this panel and for others in the House and Senate the urgency of addressing ATVs. Put flatly, they are deathtraps unleashed on unsuspecting American families. And the price has been high--pediatricians around the country see it paid every day. More and more of our young patients are being killed or maimed by these demonstrably dangerous yet popular machines. I say to you now that the American Academy of Pediatrics will keep coming back--again and again--until government fulfills its responsibility by getting these extremely hazardous vehicles out of the hands of children. No responsible pediatrician, no responsible parent, no responsible political leader should settle for anything less.

But we are being asked to. The deal that was struck among the Consumer Product Safety Commission, the Justice Department and the ATV industry is inadequate. It does virtually nothing to curb the scourge of four-wheel ATVs; it does literally nothing to assist families who bought ATVs for their children, often as a result of fraudulent, feel-good advertisements; and it does not satisfactorily address the ability of children under 16 years of age to handle such complex and inherently unstable machines. Concerned citizens, in the interest of child health, need not be deterred by such regrettably ineffective negotiations on the part of its current federal advocates for public safety.

Fortunately, other powerful voices from outside the administration and agency offer promise. The Academy applauds the relentless efforts of so many champions for children on Capitol Hill, certainly including you and your colleagues on this subcommittee, Mr. Chairman, who refuse to submit to weak agreements. ATVs, despite the slick insistence of industry ads, are not "fun for the whole family." They are killers and cripplers.

The toll is already appalling. Since 1982 more than 900 persons have been killed in ATV accidents. Nearly half of these victims were under 16 years of age, and many of them were under 12. Those are just the fatalities. There have been nearly 300,000 ATV-related injuries, hundreds of which resulted in permanent brain and spinal cord injuries. How many more of our children and grandchildren must suffer death or disability before prudent measures are taken to prevent these predictable, unnecessary tragedies?

Pediatricians around the country continue to warn parents of the risks involved with children riding ATVs, but the casualties keep piling up. We alone cannot remedy this problem. We know it will take firm and skillful political leadership, such as that in evidence today, to make a difference. But we simply cannot delay, and we cannot meekly accept this pending agreement with the ATV industry, which leaves our children at the precipice. Incredulous parents of victims ask time and again, and with every right, "Why didn't someone warn us of the dangers? Why are these machines even allowed on the market?"

To be sure, the consent decree trumpets its emphasis on warning the public of ATV risks. It is the judgment of the Academy, however, that this is the least--perhaps the very least--that Justice, the Commission and industry can offer to do to attempt to protect American children. In the first place, warnings alone probably won't work, especially with teenagers, who all too often regard themselves as indestructible. Moreover, by providing only marginal safeguards this agreement could lull parents and children into believing that effective action actually has been taken, and that ATVs now are somehow safe.

Mr. Chairman, as physicians dedicated to the promotion of child health, I must say to you that we do not regard the regulation of ATVs as a complicated issue. Recent studies document conclusively the severe consequences of ATV use by children. Spinal cord injury resulting from ATV mishaps was sustained by five children cared for over a 15-month period at the University of Alabama. Basilar skull fractures, liver lacerations and splenic rupture were among injuries resulting from ATV spills in a series of 12 admissions over a 26-month period to the pediatric trauma service at the University of Virginia. Seven children suffered head trauma from ATV incidents treated at the Gillette Children's Hospital in St. Paul. At Virginia the average hospital stay was 20 days. The majority of the Minnesota children suffered permanent damage or died.

The litany is painful, persuasive and endless--because of these vehicles, our children are losing life and limb. Yet unlike so many childhood diseases with which we grapple, the cause of this carnage is not obscure. Our experience in child development makes clear that children lack the coordination, balance, reflexes, perception, maturity and judgment to operate three- and four-wheeled ATVs safely. No labeling, no education, no training, no practice, no supervision could suffice to provide this developmental maturity. The morbidity and mortality rates will not substantially change as long as these vehicles are available to children.

Mr. Chairman, what the government finally has done, and only after years of pressure from consumer groups and legislators, is reach a "compromise" agreement with ATV manufacturers. But the only issue compromised in this deal is public safety, certainly that of children. The CPSC and the Justice Department announced on December 30, after the holiday shopping season, their agreement to ban future sales of three-wheel ATVs and to require manufacturers to undertake buyer-education campaigns. That agreement, of course, offers no recourse for families who already own ATVs. And with no refund or recall provision included in the agreement, 1.6 million three-wheel vehicles linger like ticking time bombs in the hands of consumers, including many American children. Three-wheelers have an average life span of seven years, so the AAP is bracing for the wave of children's death and injury to continue well into the 1990s.

Pediatricians are also bracing for undiminished deaths and injuries from four-wheel ATVs, which we regard as essentially as dangerous as three-wheelers in the hands of children. Regrettably, they will still be legally available for sale--some to children as young as age 12--under the proposed deal. The Academy strongly believes that no child under the age of 16 should be permitted to operate any ATV. Indeed, on the very day that the parties announced the preliminary consent decree, a 16-year-old boy was killed in upstate New York when his four-wheeler flipped over and crushed him. Since these models are newer, data is scarce, but of the ATV deaths reported to the CPSC in the first five months of 1987, 45 percent involved four-wheel ATVs. The preliminary consent decree totally ignores this issue.

Commissioner Anne Graham of the CPSC published an eloquent dissent on December 30 with which the Academy fully concurs. "Since 1984 the Commission has been working with the (ATV) industry to no avail. This industry's record is not credible," Commissioner Graham stated. "For the most part, this (ATV) industry has not demonstrated any responsible self-administered cautions or safeguards when the hazard to the consumer became apparent. Industry's inaction is particularly difficult to believe with regard to children." The commissioner went on to emphasize that "the government, to the best of my knowledge, has never faced a problem in its control that allowed 20 Americans to die each month."

Mr. Chairman, the Academy is not prepared to question the motives of the principals who negotiated this terribly deficient ATV deal for the children of this country. But neither are we prepared to accept it. As you know, the Academy, along with several other child health advocate groups, filed suit in federal district court earlier this week to defer action on the preliminary consent decree until such time as relevant parties have an opportunity to illuminate the disservice being done to our children. In addition, we continue to offer our vigorous support of pending legislation that would restrict ATVs broadly and efficaciously. Pediatricians believe that ATVs are the most serious new product-related hazard to the health and well-being of American children, and their availability and use must be restricted aggressively. We deeply appreciate your unremitting efforts to that end.

Mr. **Barnard**. Thank you very much, sir.

Doctor, the organization that you represent, American Academy of Pediatrics, have they done anything to try to enact legislation within the States to put limitations as to who can ride the ATV's?

Dr. **Narkewicz**. We certainly have, Mr. Chairman. We continually update all of our constituents on the statistics. They warn their patients; that is not enough. Each of our State chapters throughout this country is active in attempting to put forth model legislation that will accomplish this task, and I had the distinct privilege to speak at the AMA this year at its annual meeting in an attempt to have them help us in model legislation.

But, Mr. Chairman, we need more. To wait for 50 separate States to enact legislation to protect these children, whom we have a responsibility to protect, is to wait too long. We have a responsibility to act now.

Mr. **Barnard**. Doctor, does the American Academy of Pediatrics have any addition to the settlement that has been reached that you would prescribe?

Dr. **Narkewicz**. I think I have reiterated in my testimony, Mr. Chairman, that there is not enough in it for kids. It doesn't address the issue that children, no matter how much warning to those under the age of 16, simply lack the capability and mature judgment to drive safely any type of an ATV.

So I would add to the decree that the sale of ATV's must be banned to children under 16 and they must be restricted from driving them.

Mr. **Barnard**. Well, I think that is reasonable. You know where the problem comes with us is that do we have the jurisdiction to forbid children to ride them under 16?

Mr. Craig has indicated earlier that really is a State matter, more than it is a Federal matter. And you know, the thing that concerns me, I guess, do you think that there has been enough publicity on this—the dangers of this vehicle, that if the Consumer Product Safety Commission did offer a refund or a recall, do you think the parents of the country would subscribe to this?

Do you think they would turn them in?

Dr. **Narkewicz**. Well, I would hope that the industry would be responsible and be willing to fund a significant public education program in an attempt to educate the public, that it would be in their best interest not to have children under 16 drive vehicles. And, yes, I do believe that if the public can be reached, responsible parents will turn them in if there is some sort of a rebate or some sort of a deal worked where they are not going to lose their investment, particularly if their investment was made on the basis that this was fun for all the family, and parents inadvertently bought a machine not knowing it was very dangerous for their child.

Yes, I do believe that is correct, Mr. Chairman.

Mr. **Barnard**. Not meaning to leave out the other witnesses, but these are questions I felt like the American Academy of Pediatrics really should address. Is it interesting to you that the only American, from the information I have—and if I am wrong, I will stand corrected, but is it interesting to you that the only American manufacturer of three-wheeled ATV's have offered a refund, offered to take them off the market? They offered the remedy that you just said that you thought was reasonable, and, yet, that remedy was not accepted.

Does that appear to be interesting to you?

Dr. **Narkewicz**. Yes, it does. It is interesting to me, but I will have to leave that judgment in your hands, because I am given to believe that politics is the art of compromise, and I understand that. But you have to realize that I have to deal with my patients on a 1-to-1 basis.

I am trained as a medical scientist. I am trained to weigh the facts and when I have to deal with parents on a 1-to-1 basis, I can't compromise. So, yes, it is very interesting to me, and I am pleased that they would offer to do that.

I just do not understand why the other manufacturers would not do that.

Mr. **Barnard**. Ms. Sumner, there are a number of questions I would be inclined to ask you and Mr. McFadden. I don't do that because I don't want to make the strain of your testimony any more than it is.

I think what you have said has been very helpful, and, of course, you certainly have evidence that the strain and the pain of that experience, that an experience like this offers in every family that has had one of these kind of accidents.

In our previous hearings we have likewise had families who have experienced sadness in their family because of these ATV's and we are very sympathetic.

I would like to ask you one question, though. As I understand it, you and your family were visitors, and the three-wheel ATV that he was riding belonged to a friend?

Ms. **Sumner**. Yes.

Mr. **Barnard**. Had that friend had any instruction or any careful training as to how he would operate that vehicle?

Ms. **Sumner**. No. Not only hadn't the friend had any training or instruction, but basically the parents didn't know anything about it either. Granted, this was almost 4 years ago, and in some small way, things have changed, but this is one of my points and it is one of the points somebody else made. Those machines are out there. Nobody is going to be training friends of children, nobody is going to be standing there forbidding friends of children who have had training to get on these vehicles and injure and kill themselves.

And until they are recalled and people are given the opportunity to get their money back and return them, they are going to stay out there. And I just wanted to say one other thing.

When you talk about giving responsibility to the States—I am from Wisconsin, and I show you A.B. 57, which was sent back to committee yesterday. I was on the phone right before I left for Washington. It is a bill to try and regulate ATV's and don't think it is so easy on the State level. There are plenty of fights. Wisconsin is basically a rural State and people are protecting their ATV's just the way Mr. Craig is protecting his ATV's.

We are not telling people that they have to give them back if they don't want to. What we would like to say is there should be the opportunity for those people who maybe are wishy-washy to have the extra incentive of getting money back if they return their vehicle. In addition, if there is some kind of licensing and regulation, it gives responsible parents the idea that something is wrong here.

What parent lets their small child drive a car? And I am so tired of hearing about the boating accidents. People know that children shouldn't be driving speed boats. They know it is dangerous. If they let their children drive a speed boat, they are irresponsible parents.

I was not an irresponsible parent and neither are many of these other parents. These things were marketed as safe, stable family fun. They are not.

Mr. **Barnard**. Do you remember any of the ads?

Ms. **Sumner**. I had never heard the word ATV before I saw one, but I have since seen the ads. I have seen more than I want to see.

I can show you one example. This was in the paper in Wisconsin after my son's accident, after what I had been through, this appeared in a leisure kind of supplement to the Milwaukee Journal.

It is entitled "ATVs, Action Thrills Adventure." Look at this. This is dated June 1986. This is almost a year after my son's accident. This is what they were putting in a newspaper, in the leisure section of a newspaper.

Believe me, I called the editor and I wrote a letter to the editor, and so forth.

I don't believe that all parents and all people have the judgment, and I don't want to say the brains, to responsibly take care of their children. There are a lot of things we regulate, that we don't let—we don't let parents give drugs to their children, do we?

We don't let parents do a lot of things. Just because a parent lets a little child get on an ATV and makes that judgment for the child, that that child will be brain damaged or quadriplegic or dead, that doesn't mean the Government should let that parent make that decision.

Mr. **Barnard**. Mr. Craig.

Mr. **Craig**. Thank you very much, Mr. Chairman.

Ms. Sumner, and Doctor, thank you for your testimony. A couple of questions of the doctor.

First of all, let me say I appreciate and applaud your open and vigorous stand and condemn it in no way. I think the points you make are extremely valid, especially as it relates to the 16-year-old and above and there seems to be, and we all have seen that as parents, a line of demarcation or maturity when all of those things come into balance.

You listed a series of things from maturity, balance, coordination, and I would say that is the very list of things you could say ought to be there before an individual drives a car.

That is why we have laws that say certain ages don't do certain things. I totally agree that that ought to be done.

You have criticized the ATV settlement stating that the age issue is not addressed, is that correct?

Are you aware that the preliminary settlement includes—prohibits the manufacturers from marketing adult-sized vehicles to children under 16?

Dr. **Narkewicz**. Yes, I am.

Mr. **Craig**. So there is some provision attempting to address the age question in there?

Dr. **Narkewicz**. But marketing and prohibiting—prohibiting marketing and prohibiting the vehicle to get into the hands of children are still two different items.

Mr. **Craig**. They are two different items, but it is very important to understand that you must be licensed to drive a car, and you are fined and/or arrested if you are under age, but nobody stops you until the point of the action.

Now, in the case of the distributor or an ATV dealer selling an ATV knowingly to a 16-year-old or under, we have a Federal judge in this instance who can come forward and stop that and probably that man or woman or business will not be in operation again.

I think that is the point. So as far as we can go or at least it appears as far as can be taken under this without some State involvement, and I totally agree with you and I hope you, Ms. Sumner, work awfully hard in your State to force this issue, that it is of a most difficult thing to get at unless you do a total ban and simply take them all off the market and compensate the consumer at that point.

I guess one question. I really hate to belittle this, and it is not a matter of belittling it, but I think it is an important thing to say.

Ms. Sumner, in the advertisement that you held up, I would suggest to you that it could be and probably is misleading, and you have a right to react to it that way. But I observed while you were holding it up that the individual who was astraddle of that three-wheeler had a helmet on, had gloves on, had all of the safety devices on that the manufacturer recommends be worn at the time of utilizing the vehicle.

Now, observe it, helmet, gloves, chin guards, boots, there they are.

Ms. **Sumner**. You are telling me you think this is a safe position?

Mr. **Craig**. I am not saying that. I am suggesting that the manufacturer recommends, does not insist because they can't enforce.

Now, does your State have a helmet law?

Ms. **Sumner**. For ATV's?

Mr. **Craig**. For motorized vehicles, motor vehicles, all of that.

Ms. **Sumner**. They are fighting about it. So it is hard for me to answer.

Mr. **Craig**. I don't know either. That is why I asked the question. Because, I have got a 13-year-old boy. I can feel for you. My 13-year-old boy does ride ATV's from time to time. He has never been astraddle of one without a helmet, gloves, chin guards, or without all of the things that will help make him safer during the machine's operation.

Now, I am aware that you didn't know and I am not in any way questioning your judgment, but the point is, that advertisement, and we have been very critical of the industry for misleading advertising and there has been a dramatic shift in the last several years because some of it was terribly misleading, but if you note the advertising now, it doesn't show anyone on any of those machines without the proper accessories, if you will, while using the machine. That is true of motor vehicles, and it is why we have safety belt laws. We are saying it for automobiles today and trying to make them safer and trying to assist the consumer in being safer as they make the judgment whether to ride or not to ride.

Ms. **Sumner**. I just have to answer you that 2 days after my son's accident there was an article in the Milwaukee Journal about a man that someone in the hospital knew. It was a man, not a child, wearing a helmet who was thrown from an ATV and the helmet somehow hit him in such a way and his spinal cord was severed and he was dead.

So the fact that——

Mr. **Craig**. Absolutely true.

Ms. **Sumner**. Wearing a helmet doesn't mean anything to me.

Mr. **Craig**. It is not absolute. We all know the point. The point is percent and averages. You can't totally protect everybody.

The same way with safety belts.

Ms. **Sumner**. You can protect children more than you are.

Mr. **Craig**. Safety belts decrease the potential of being injured in an automobile accident by substantial amounts, but depending on the severity of the accident, they will not totally protect the person from death. And that, of course, is the difficulty of it all.

All three of you, thank you very much for your valuable testimony.

Mr. **Barnard**. Mr. Shays.

Mr. **Shays**. Thank you very much.

In my 13 years in the State legislature, I often heard testimony from those who have been victimized or have lost loved ones and I don't ever recall hearing such eloquent and helpful testimony from two victims. I thank you. It makes me want to go home and hug my 8-year-old daughter as soon as this hearing is over.

I would like to ask you, Mr. McFadden, I just have a difficult time understanding the end result of your testimony, so I would like to ask you something for clarification. It seems to me as being crazy to have 13-year-old children, with helmets or without, use these vehicles. I mean, it seems crazy to me.

But in this instance, your child wasn't using the vehicle, and this same kind of accident could have happened with a snowmobile. It raises the following question to me: Is it your testimony that ATV's should be banned or that they should be highly regulated?

It seems to me what you are pointing to is regulation more than a ban, because in certain instances an adult could use these vehicles and use them safely.

Mr. **McFadden**. Yes, sir. I guess, if you look to the gist of what Deb and I believe, I feel that you purchased it. You have the right to—maybe to use what you purchased, if it is for sale in the United States. You can use it on your property, but the penalties ought to be extreme, if you stray off your property and harm my child, they ought to be extreme if I am invited onto your property and you harm my child or you harm me.

I should have some sort of recourse to make you think twice about putting your child on it or even getting on it yourself.

At the present time there is very little recourse out there.

Mr. **Shays**. But if your child had been hit by a snowmobile, would you be testifying the same way with the same message?

Mr. **McFadden**. If the question was vehicles on a——

Mr. **Shays**. You haven't had much time to sort this out, but I am wondering if we had had a hearing on snowmobiles, if you would be really saying the same thing. It seems to me it is really the use of the vehicle rather than the vehicle itself.

Mr. **McFadden**. That perhaps in our situation is the case. The use of a vehicle like this, where it is not on a road and not regulated, it is not licensed and, in fact, it doesn't even have to be insured, is really a license to kill or license to maim.

And it needs to be addressed at the Federal level and at the State level and Deb and I are going to pursue both.

One interesting approach in listening to people talking about recalls and trying to find the funding for that, I understand that that could go on for years. I understand the point that some legislation is better than no legislation. I can hear all that.

If you consider at the State level or some sort of a Federal intervention where the States somehow are required to license the drivers, license and inspect the vehicles and carry, say, $500,000 of liability insurance. When the insurance companies of America are forced to carry the insurance tab on 1.5 million vehicles, very quickly parents are going to find that they have to pay a $1,500 a year insurance bill instead of $60 or $70. Very quickly, junior will not be on the vehicle.

You will use it in your work activities, use it on farms. You will not use it as a recreational vehicle. It will be parked. They will not be able to get insurance on ski slopes for these vehicles and other little kids like my son won't be killed.

Mr. **Shays**. Ms. Sumner, when you were about to show me that picture, what I thought you were going to do is show me a picture with the husband and the wife and the three kids all riding these vehicles on a calm and sunny day. I reacted and said, God, I would never want my children riding on it. I viewed that picture differently than you viewed it. It clearly, to me, is a picture that would say, you know, be careful.

Ms. **Sumner**. How about the headline, "Action, Thrills and Adventure?"

Mr. **Shays**. Clearly, action, thrills and adventure and it is something else.

Ms. **Sumner**. It makes you brighter than a lot of other people. Pat yourself on the back.

Mr. **Shays**. If it pictured a peaceful, relaxing vehicle, I would have really been concerned.

Thank you, Mr. Chairman.

Mr. **Barnard**. I am surprised you didn't bring the advertisement I remember years and years ago. It showed one of these ATV's climbing a wall. Now, I did think that was a little absurd. You know, I don't even believe that.

I believe there are a lot of folks who read that ad, maybe think it would be a great thrill to take one of these ATV's, stand it up the side of a wall and think it was safe. Do you remember that ad, Doctor?

Dr. **Narkewicz**. Mr. Chairman, yes, I do. That brings up a point we ought to touch on at the moment. We are looking—you saw the statistics, and I think that if we go back to the conclusion that the task force, and I am talking about the Consumer Product Safety Commission's task force, their conclusions, three of them burn in my mind.

One, children under 16 are unable to operate safely any sized ATV, but children under 16 are especially at risk of death and injury if they ride any adult-sized ATV. The industry's voluntary standards are inadequate, which brings me back to the point that, in the age group of the preteen to 16, they traditionally are in the risk-taking age group, and pictures like that are very exciting.

That guy is doing a wheelie on that, if you look at it closely. I will tell you one thing. You don't stop children from smoking cigarettes by telling them they are going to have cancer when they are 50 years old. You don't stop them from driving automobiles at 50 or 60 miles an hour by telling them they are going to have an automobile accident, because they don't take any of this into consideration.

I think if we are going to solve the problem of children's injuries on ATV's, we have to take the vehicle away from them. That is simply my point.

Mr. **Barnard.** Thank you very much. We appreciate all three of you being with us, and we thank you for your testimony. And it will be very helpful to us.

Mr. **Barnard.** Our next panel this afternoon will be Mr. Paul Rubin of Glassman-Oliver Economic Consultants, Inc.; and Mr. Gary Surdyke, Yamaha dealer of Crystal City, MO.

Gentlemen, welcome to the panel this afternoon. We will first hear from Mr. Rubin and then we will hear from Mr. Surdyke, am I pronouncing it right?

Mr. **Surdyke.** Surdyke, yes.

Mr. **Barnard.** We will hear from Mr. Rubin first.

STATEMENT OF PAUL RUBIN, PH.D., GLASSMAN-OLIVER ECONOMIC CONSULTANTS, INC.

Mr. **Rubin.** I will summarize my remarks.

Mr. **Barnard.** Your entire testimony, without objection, will be entered into the record.

Mr. **Rubin.** Thank you.

I was Chief Economist at the Consumer Product Safety Commission, for 2 years. I am now a private consultant. Previously, I had been at the Federal Trade Commission, and for a long time before that, I was professor of economics at the University of Georgia. So you were my Congressman for many years.

At CPSC, I was heavily involved——

Mr. **Barnard.** I hope that doesn't affect my questioning.

Mr. **Rubin.** At CPSC, I was involved in the ATV project and analysis, but my testimony today is based entirely on public materials and the views are my own. They don't reflect anyone else's opinion, obviously.

If we discuss the issue of a prospective ban versus a recall of three wheelers, in terms of the economic analysis, we can see that ban can be viewed as justified. Over the life of the vehicle, we have estimated that the costs of injuries on the three-wheel vehicle are $650 more than the comparable costs on a four-wheel vehicle, and difference in production cost is only about $200. So, there is a net saving of about $450 per vehicle from a ban. For example, if sales were 50,000 a year, the saving in injury costs is about $32 million, and the net benefit would be $22 million. So, the ban of, or the decision not to sell, three-wheel vehicles is a decision that makes sense from a cost-benefit viewpoint. From the data I am aware of, there is no signficant difference in probability of death between three and four wheelers. We are talking about only injury differences. These cost figures are solely based on injury costs.

It appears that accident patterns involving deaths are different than those involving injury. For example, about half of the deaths are a result of collisions, and there would be no difference in collisions between three- and four-wheel ATV's.

Of course, it is not surprising that a ban is justified and a recall is not. We commonly ban things prospectively, but we don't recall them retrospectively. CPSC banned baby cribs with widely spaced bars, flammable mattresses, and lawn mowers without "dead man" controls, but did not recall those things. NHTSA requires, for example, safety belts, or high brake lights, but again, did not make a decision to recall products without them. So, at some point, people do pay attention to costs. Costs are very different between a ban and a recall.

One might say ATV's are so dangerous they should be recalled independently of the costs. We have to realize, if we look at a product like ATV's, that there is some level of risk that consumers might want to accept. If we try to compare ATV's with other vehicles, we find that ATV risks are greater than trail bikes, but about the same as snowmobiles and very significantly less than on highway motor vehicles. So, there is no evidence that I have seen that indicates that the level of risk on ATV's is outside of the range of risks that people might want to accept, given the benefits they get.

Of course, there is the issue of children, but my next point is that recalls would have no effect on the risk borne by children. The reason is that this product is unique among things that CPSC regulates in that there is an active and well functioning market for used ATV's. To my knowledge, there is no other product that CPSC regulates where this is the case. There are sporadic markets in garage styles, but no product where you see ads in the paper and dealers carry them. For example, our survey of users showed about 30 percent of the vehicles were in fact bought used, which means there is a very active market.

This means that if people have ATV's and decide they don't want them, because they are too risky, or they are ridden by children, or for whatever reason, they can sell them. They are easy to get rid of. Put an ad in the paper or go to the dealer and sell them. There are widely available mechanisms for selling. Anyone who owns an ATV owns one because they want one, not because they may have been misinformed when they bought it. The bottom line is that a recall really doesn't give an ATV owner any option he doesn't now have. The owner now has the option of getting rid of his ATV for money. The recall would not affect that. The first order effect would be to replace the used ATV market, but there is already a used ATV market.

The original Commission position, as I understand it, was for a recall, but at the same time, the Commission did not vote a ban on sale of the three-wheeled ATV's. This must be interpreted as saying that the original Commission position was a recall, but the recalled vehicles could have been resold by dealers in the used market. Some people thought that might not happen. Our estimates were that the recall would have cost between $500 million and $1 billion. Given those levels of costs, one would expect the dealers or manufacturers would have chosen to resell the recalled vehicles.

This program would have no benefits. There is a used market now of people choosing to turn in their ATV's. Under a recall essentially the same people who would otherwise sell their ATV's in the used market would turn them in. People buying ATV's after a recall would be the same people who would buy ATV's in the used market. So, I don't see any effect on current owners of ATV's of a recall with resale. It would have had substantial transactions costs, perhaps in the order of $50 to $100 million, on the manufacturers. This is simply the cost of turning these things over. There is no safety benefit that I can perceive. Moreover, CPSC is a small agency and trying to monitor such a program would have been a significant drain on its resources.

If we think about a program that is a recall without a resale, which, as far as I know, has not been proposed, but if we try to analyze that program, we must realize it is one of the most difficult programs to administer that one could think of. There are many model years, and each would have to trade at a different price. It would be very, very difficult to determine these prices. I don't know of a theoretical method of determining the correct price to use for each vehicle.

If you pay a price above the going used market price, which you have to do to make the recall worthwhile, one effect would be to give a windfall to current owners over and above the value of the ATV. In my mind there is a real question about this policy. First of all, there is evidence that some accidents are due to operator behavior. So, we might ask if a windfall of this sort would be appropriate. Second, there is a real question as to whether we want to create a national policy of telling consumers, when you buy dangerous products, later on someone is going to compensate you. That is an issue that would bother me.

The recall would have a relatively small impact on safety. People who own ATVs want to own them; if someone turned in a three wheeler as a result of a recall, the most likely thing for that person to do would be to buy a four wheeler. Four wheelers are safer than three wheelers by the $650 indicated before, but the gain is relatively small. The gain is about a third of the size of the costs. For example, if there were a recall with 30 percent of the vehicles returned, we can estimate that the program would cost about $500 million, and the benefits would be about $167 million, so the net cost would be $333 million. The total cost would be three times the benefits. Those are not issues dealing with life saving, but with injury reductions. So, from this perspective, a recall would be a difficult policy.

Think about litigating the issue of a recall. This apparently is what would have happened from what I see in the press. One point is that the things I have just said would have been said in court, and it is not clear what would have happened.

Everything I have said is based on straightforward economic analysis, and any economist would come to similar conclusions.

In fact, many of the assumptions I made would be contested. I said three wheelers are more dangerous than four wheelers. There is some data I have seen generated by others disagreeing. If we had a jury listening to arguments, with expert economists dealing with specification of complex regression equations, I wouldn't want to bet on how that litigation might come out.

The price offered in a recall would be crucial. If the price were a little below the used market price, the recall would have no effect. One would expect manufacturers to spend significant amounts litigating that very issue.

If litigation would have delayed the recall by 3 or 4 years, we can estimate that there might have been about a quarter million vehicles left to recall. With a 30-percent return rate, that would have been 75,000 returned. A guess as to the rough level of benefits might be $8 million in injury reduction at a cost of about $24 million.

It is my understanding that the Consumer Product Safety Commission now uses a value of life figure of $2 million. If we were to think that way, we can say that any education and training program which saves as few as four, five, a half dozen lives today would be more beneficial than a recall program delayed by 3 or 4 years.

We don't like to think in these terms, but on the other hand, there are tradeoffs that have to be made, and the evidence that I have seen indicates that a training program now would be more beneficial than a recall delayed by a substantial time.

One other point. For the various programs I have discussed, cost could be from $50 to $350 million more than the benefits. Society now chooses to spend $30 million on the Consumer Product Safety Commission. Whether we want to spend between 2 and 10 times as much as that on a recall program is a decision that we would have to make, but those are the magnitudes of numbers we are talking about.

Thank you.

Mr. **Barnard**. Thank you very much.

[The prepared statement of Mr. Rubin follows:]

STATEMENT BY

PAUL H. RUBIN

GLASSMAN-OLIVER ECONOMIC CONSULTANTS, INC.

before the

SUBCOMMITTEE ON COMMERCE, CONSUMER, AND MONETARY AFFAIRS,

of the

COMMITTEE ON GOVERNMENT OPERATIONS

UNITED STATES HOUSE OF REPRESENTATIVES

January 28, 1987

Mr. Chairman:

Thank you for inviting me to testify before this committee.

I was Associate Executive Director for Economics (Chief Economist) at the Consumer Product Safety Commission for two years. Previously, I was a senior economist at the Federal Trade Commission and at the President's Council of Economic Advisers. I have also been a professor of economics for many years, primarily at the University of Georgia, and have written two books and over fifty articles on the economics of government and regulation. Therefore, I am speaking both as a practitioner and as a long time student of regulation. At CPSC, I was heavily involved in the ATV project, and my remarks today reflect that experience, but of course the views are my own. These remarks are entirely based on public materials.

I will first discuss a ban on sales of 3 wheelers compared with a recall. I will then discuss alternative recall plans. Finally, I will indicate some of the issues which might be involved in litigation of a recall.

To anticipate the results: The ban on sale of new 3 wheelers will have no effect on deaths, but will be a cost effective method of reducing injuries. There are two relevant recall policies for 3 wheelers: a recall with resale allowed (which was apparently the original Commission policy) and a recall with resale forbidden. The first policy would have no effect on ATV safety, but would have substantial costs. The second would be extremely difficult to administer. It might have some effect on reducing injuries, depending on how it was executed, but would have no effect on deaths for current owners of ATVs. Whatever injury reduction occurred would cost much more than its value to consumers. These conclusions are based on analyses of the interaction between a recall and the market for used ATVs, and of the difference between 3 and 4 wheelers.

Many of the underlying assumptions would be disputed if there were litigation, and the outcome of those challenges is not certain. Moreover, if litigation about a recall took four years (as has been suggested) there would be relatively few 3 wheelers left to recall as these vehicles age and are withdrawn from use. This indicates that the benefits of the program would have been small. The benefits of an immediate notice, warning, and training program are likely greater than the benefits of a recall delayed for four years.

PROSPECTIVE BAN VERSUS RECALL

A prospective ban on sales of 3 wheelers is economically justified. The risk of injury on 3 wheeled ATVs is greater than the risk of injury on 4 wheeled ATVs. Over the life of the vehicle, the best estimate is that 3 wheelers will cause emergency room treated injuries costing about $650 more than injuries on 4 wheeled ATVs. For new production, the cost difference between a 3 and a 4 wheeled ATV is about $200. Therefore, there is a net saving of about $450 in injury costs per vehicle from a ban on 3 wheeled production.

The industry for the 1988 model year had planned no sales of 3 wheeled vehicles, perhaps in anticipation of the results of the negotiation with the government. If sales of 3 wheelers would otherwise have been 50,000 per year, the saving in injury costs from this program is about $32,000,000 per year, and the net benefit is $22,000,000.

The evidence of which I am aware indicates no difference in probability of death between 3 and 4 wheeled ATVs. If there is such a difference, it is unlikely to be large. About half of the deaths involving ATVs are a result of collisions, and there is no reason to expect any difference in 3 and 4 wheeled vehicles with respect to collision safety. Any policy shifting riders from 3 to 4 wheeled ATVs will have no measurable impact on death rates.

Since there is no difference in death rates, the analysis so far has not been based on any "value of life." The injury cost figures used are those which the Commission has regularly used and published for many years, and which are relied upon by CPSC in rulemaking, and by other agencies within government. These figures include a generous estimate for "pain and suffering."

The analysis assumes that riders perceive no difference other than safety differences between 3 and 4 wheelers; that is, that ATV riders would not pay anything for any differential handling of 3 over 4 wheelers. Technically, the assumption is that 3 and 4 wheelers are perfect substitutes in consumption. This is the most favorable assumption for a recall.

It is not surprising that a ban is economically justified but a recall is not. A recall is commonly more expensive than a prospective modification, and the ban on sales of 3 wheelers is prospective. A recall generally involves either a retrofit of a product, which is more expensive than a prospective change, or else destruction of the entire product, which is even more expensive. It is common for regulatory agencies to order prospective but not retrospective product modification. For CPSC, for a few examples, there were no recalls of: baby cribs with improperly spaced bars; mattresses which did not pass flammability tests; lawn mowers without "dead man" controls; or chain saws without anti-kickback provisions. Similarly, NHTSA did not recall automobiles lacking safety belts or dual braking systems, or, more recently, a third brake light. I do not know if formal cost-benefit analyses were performed for these products, but costs of recalls are much greater than costs of regulation, and the regulatory process pays attention to these costs, either formally or informally.

It may be argued that ATVs are so dangerous that a recall should be undertaken in spite of the costs. For a new product such as ATVs, the level of risk which consumers might find worth accepting is difficult to measure. We can, however, measure risk on other, similar products. When we do, we find that the level of risk on ATVs is well within the range of risk on similar products. Our best estimates are that, adjusted for use based on various surveys of riders, weighted risk of death and injury on

ATVs is greater than on trailbikes; about the same as on snowmobiles; and significantly less than risks on motorcycles. It is not at all clear that risks justify a recall, particularly since a recall would have had no impact on deaths.

Some may say that since the risk on ATVs is relatively greater for children under 16 than is true for the other vehicles, the recall would be justified. However, a recall would not effect this risk. Any parent wanting to get rid of an ATV ridden by a child can easily sell it in the market for used ATVs, a well functioning market; there is no need to park the ATV in the garage until the child gets old enough to ride it properly.

RECALLS AND THE USED ATV MARKET

In analyzing possible recall actions, it is important to consider the impact of the used ATV market. This is a well functioning market; for example, a CPSC survey shows that about 30% of ATVs were bought used, indicating that owners can sell their machines on the used market. This means that consumers can change their minds about ATVs with little cost. Anyone who decides, on the basis of information about risk or for other reasons, that the ATV purchase decision was unwise can sell the machine in this used market. In other words, anyone who now owns an ATV does so because he or she wants to own the vehicle, not because of a previous decision to buy. **A recall gives no options to ATV owners which they do not already have.**

The first order effect of any recall program will merely be to replace this used market. If a policy were to force manufacturers to recall ATVs at the correct price, those turning in their machines would be those who would otherwise have sold them in the used market. If resale of recalled ATVs is allowed (as would apparently have been true of the initial Commission proposal), then those buying the recalled vehicles from firms would be those who would otherwise have bought them in the used market. If resale is not allowed, then some buyers will switch from 3 to 4 wheelers, as discussed below.

Recall with Resale

The original position voted by the Commission was for a recall of 3 wheelers and of certain 4 wheelers, but since future sales were not banned, the recalled vehicles could apparently have been resold. Since the value of these vehicles probably would have been about $500 million to $1 billion, resale would have been likely.

For a complex good such as an ATV, with many model-years involved, it would have been difficult to determine the proper price to pay for a recall. If the price had been too low, the recall would have had no effect since ATV owners wanting to sell would have sold in the used market. Had the price been too high, some consumers would have returned machines who otherwise would have kept them, and used the proceeds to buy new machines (since they wanted to own an ATV at going prices.) In order to resell these additional returned machines, the secondary price would have been below the original used price, leading to increased ATV usage and increased injuries. In what follows I assume the best case for the policy, that the Commission would have been able to determine the correct recall price.

The recall with resale would have imposed substantial costs with no benefits. Anyone wanting to sell an ATV would have [illegible] for a refund; the firm would then have sold [illegible] would have been [illegible] been [illegible] resources. However, there is no way in which a recall with resale allowed would have reduced [illegible] deaths.

Recall Without Resale

[illegible] not aware of a recall program aimed at removing from use a good with an active used market. This recall program without resale would be a uniquely difficult program to administer and analyze.

The difficulty is this: There is no well defined price at which to recall the ATVs. Each model-year ATV trades at a price in the used market. With some effort, it would be possible to determine these prices. However, this would not be a meaningful price for a recall. If the recall price were at the used price, relatively few ATVs would be returned, because, as some were turned in, reduced supply would cause a price increase in the used market, so no more would be returned. If the recall price were below the initial used price, none at all would be returned.

The only way a recall would be meaningful would be if the price were above the initial used price. Those controlling the recall could determine the number turned in by adjusting the price; the higher the recall price, the more ATVs would be returned. At any given recall price, ATVs would be returned until the price in the used market exceeded the recall price, at which point owners would stop turning in ATVs and instead sell them in the used market. This policy raises several difficulties.

First, the increase in price of used ATVs would be a windfall gain to current owners, since they have had the use of the machines for some time. This windfall would come partly at the expense of producers; the rest would come at the expense of potential buyers of used ATVs since they would pay a higher price. Since the data show that accidents are in significant part due to operator behavior, this windfall gain may be inappropriate. A policy which provides such a gain to purchasers of dangerous products would have perverse incentive effects for future behavior; for example, it might create an incentive for some consumers to buy risky products in the hope of a subsequent

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recall and windfall.

Second, the program would be extremely difficult to administer. There are many models and vintages of used ATVs; each sells at a different price. Demand and supply conditions for each vary in relevant but unknown dimensions. This means that there are no principles for establishing a premium above the used price or for determining the relative premium for each model and vintage. If the recall program led to a 50% return rate for Hondas and a 10% return rate for Yamahas, this would be difficult to justify. However, I see no way that a policy could be established to avoid results like this. Would the owners of Yamahas have an action against CPSC alleging that the premium for their machines was not as great as that for Hondas?

The final point is that the recall would have a minimal impact on safety. As the recall price rose above the used price, owners who wanted to continue to own ATVs would return their vehicles and use the proceeds to buy new ATVs. Also, potential buyers of used ATVs would not be able to buy these ATVs in the used market; instead, many would buy 4 wheelers. Thus, the major impact of the program would be to shift some owners and buyers to 4 wheelers. There is some gain in safety from this. However, the cost of this program would be the total value of the 3 wheeled ATVs; the benefit would be the additional safety of a 4 wheeler over a 3 wheeler. Costs are about three times as large as benefits. The price increase in the used market might lead to a reduction in deaths and injuries as some potential buyers of used vehicles decided not to purchase at the higher price. However, we do not in general consider policies which raise prices for consumers as being beneficial.

ATVs cost about $2000 new. For a new ATV, the additional expected injury cost for a 3 over a 4 wheeler is about $650; there is no difference in the probability of death. Thus, if a new machine is turned in under a recall, the cost is $2000 and the benefit is $650. For older used machines, costs and benefits would fall proportionally; costs of this program are about three times benefits.

To see the magnitudes involved, let the recall rate be 30%. Assume that the recall would occur immediately; if it were delayed (as by litigation) these figures would change, as discussed below. Using data on the age of ATVs in consumers' hands and using straight line depreciation implies that the total cost of the recall would be about $500 million plus whatever premium over the current value would be needed to elicit this return rate. The benefits would be about $167 million, based on the reduced injuries. Thus, costs are about 3 times benefits; the net loss to society would be at least $333 million. If a higher premium were used to get a higher return rate, costs and benefits would both rise but costs would always be at least 3 times as large as benefits.

LITIGATION

So far, I have discussed public policy issues regarding a recall. However, it appears that the manufacturers would not have agreed to a recall without litigation. While the attorneys have the most to say about this issue, I have a few comments.

First, the arguments above would also have been made in the litigation. All were based on economic analysis of public documents, and any economist reviewing the matter would have come to similar conclusions. Thus, a court might well have found that the recall was not justified, based only on the policy issues.

Second, in the analysis just presented I made assumptions which most favored a recall. However, some of these would have been contested in court. Some examples:

I based the analysis on estimates showing that 3 wheeled ATVs were more likely to be cause injuries than 4 wheelers. However, analyses by economists employed as experts by the industry indicate that there is no difference in probabilities. I trust my analysis, but litigation involving competing economic experts debating arcane issues of the specification of regression equations would have an uncertain outcome.

I also assumed that 3 and 4 wheeled ATVs were perfect substitutes in use; that is, that riders would be indifferent except for safety considerations. This is a matter which would be tested through surveys; if there is a difference, the cost-benefit analysis would become more unfavorable to a recall.

The recall price is crucial to the costs of the program; a higher price leads to significantly more vehicles returned, as well as increasing the cost for each vehicle. There would have been litigation over price, either as part of the litigation over the recall itself, or subsequently.

Finally, so far I have assumed that policies would take place immediately. However, litigation would delay the onset of the recall, perhaps by four years. As of the 1988 model year, no 3 wheelers were introduced, so the recall would have affected only those vehicles already in consumers' hands. There may be 250,000 such vehicles available in 1992. With a 30% return rate, 75,000 would be returned. The total benefit of this might have been $8,000,000 in reduced injuries. (The costs would be something over $24,000,000.) On the other hand, press reports indicate that the industry was willing to engage in notice, warning, and training immediately, apparently in exchange for an agreement not to seek a recall.

While benefits are difficult to measure, if only a relatively few lives are saved by these policies, then this program would be preferred to a recall, even ignoring costs. CPSC for planning purposes now uses a value of life figure of $2,000,000, according to **Newsweek**. If so, then a saving of only 4 lives through training would mean that a training program now is preferred to the recall program in four years.

SUMMARY

A recall with resale serves no purpose. A recall with no resale will either remove only a very few vehicles from the market, or it will be a complete administrative nightmare. In either case, costs are greater than benefits. On the most favorable assumptions, a recall with resale allowed would impose costs of $50-100 million and no benefits. A recall with resale forbidden would impose costs about 3 times as large as benefits; for a typical plan, costs might be about $500 million and benefits about $167 million. The net loss to society from any recall program would range from about $50 million up to about $333 million or even more. None of the possible 3 wheeler recall programs would save any lives of current ATV owners.

Since society spends only $30 million directly on product safety regulation through the CPSC, it would seem inefficient to spend 2-10 times as much over and above benefits on a recall program. Moreover, since litigation would take several years, there would be relatively few 3 wheeled vehicles to recall when it ended, so the benefits of an immediate notice, warning, and training program probably outweigh any possible benefits from a recall, even ignoring the costs.

Mr. **Barnard.** Mr. Surdyke.

STATEMENT OF GARY SURDYKE, YAMAHA DEALER, CRYSTAL CITY, MO

Mr. **Surdyke.** First, I would like to thank the committee and the American system that would allow me to come in here and give another perspective.

After sitting here and listening to this, and first of all, let me say I have great compassion and sympathy for the loss of anyone's loved one, for any injury to anybody, any death, no matter how it happens, and I don't want anything I say to be interpreted any other way. I have a large family myself, and I have 10 children, all of which, by the way, ride ATV's.

I have a 9-year-old daughter who has Down's syndrome who rides an ATV under close parental supervision. She does it safely because I see to it.

I feel a little, in listening to most of the testimony here today, like Alice in Wonderland, and I am "Alice." My feet are on the ground. I am hearing so many things that are so totally unrealistic about what the real world is when it comes to ATV's.

I have heard Senator D'Amato set the tone when he used the term "Japanese" four or five times in his testimony. I have heard it other times in other people's testimony. I offer this thought: If American companies designed, built and marketed as successfully as the four Japanese companies have done with this product, I would submit to you that they would be being held by the Wall Street Journal and all of us as a great example of American industrial know-how.

You know, we keep mentioning Polaris. Polaris has sold virtually no three wheelers. A number, but statistically insignificant. So, let's not try to say, oh, gee, this great American company is offering to do this, and these Japanese companies won't.

I have heard the conversation about the consumer checklist, that is the safety thing that the consumer has to sign and initial. It is like damned if you do and damned if you don't with that.

On one hand, we are being told now to give customers this warning and putting these things in front of them, and no, no, you shouldn't do that. I contend that most of the argument against that comes from the fact that attorneys see this problem that is going to crop up in a courtroom and make it much more difficult for them to win their contingency cases in trials.

In other words, it is going to be tougher for them to make money. I also might add there is currently a hot market on used three wheelers. When this thing came out, the first thing that happened is everybody came in wanting to buy the used three wheelers that are on the market.

I have heard this Pinto argument. This argument was first offered on the "20-20" or "60 Minutes" years ago. They would lead—these people that use the Pinto argument would lead you to believe that only 90 people have been killed driving Pintos. Only 90 people have been killed relating to a specific problem with the fuel tank of a Pinto.

We don't take this Pinto number of 90 and say, look, gee, what we did. You take ATV deaths from all reasons, and many of them incidental to the fact that it was an ATV involved, hit by a train, fell through ice, drunk, you know, those sort of things, and we will lump all of them in there and use that number and say, look, gee, all these ATV people are killed with ATV's, and we argue 90 people were killed in Pintos. Many more than 90 people have been killed in Pintos.

I think there is a point I would like to make, is that we talk about this "unsafe" product. Well, that is not true. I think the reality is that it has an enviable safety record. I will offer this up. How many automobiles are there in the United States on the road, 100 million? I think that there is not that many, I believe, but let's say there are, and 3 million ATV's, give or take a couple hundred thousand, but let's say 3 percent, in other words, there are 3 percent ATV's to cars relationship.

Well, approximately 40,000 people a year get killed in automobiles. Three percent of 40,000 is 1,200 a year. If ATV's have the same fatality rate per vehicle as automobiles, and I am not saying this is valid, but this is what is being used against us, then there would be 1,200 people killed a year in ATV's, and they are not, just 200 are, as sorry as it is.

I mean, I hate to hear, again, this child, I think of this child out of Texas that fell in this well, you know, the great focus, it was great, we were able to save that life and that is important. One life is important.

Mr. Statler refused to attend the majority of the CPSC public hearings that were held around the United States. I was a witness at one in Jackson, MI. This man went on national television, "20-20," and said, and I quote, "This is the problem—the problem is, these four Japanese companies who won't stop selling and manufacturing these things."

Now, this was before anybody had done any study on anything. He went on. If I ran my business as irresponsibly as he made that statement, I wouldn't be in business. And, in fact, he is way off on his facts when he talks of one in three, will have death or serious injury, we have sold something like 2,500 ATV's in my business, 2,500.

If what—and this goes back over 5, 6 years. If what he said was true, my business would look like a hospital war zone. It doesn't. I know of one instance where a customer of mine was killed on an ATV, and he rode it off a cliff. Now, the previous day, it wasn't a cliff. A construction company building a new highway had come through and just wiped out this edge along this trail. He came zinging over and, oh, my God, it was a cliff, and he falls 50 feet and lands in big boulders and it killed him.

And about the recall, who—I would like to know how this recall that we keep talking about is going to create public safety, because first of all, I think the only people who are going to return three-wheeled ATV's are those people that aren't using them anyway. If they are not using them, there is nobody being injured on them. I think what it will turn into is that everybody will start scrounging through the dumps and the back 40 looking for a derelict ATV, and they will try to turn it into cash. That is what it will motivate people to do.

And listening to I believe Ms. Sumner, it reminded me of an incident that happened to me when I was 15 years old and my older brother was 16. My Aunt Sophie, sweet lady, let us drive her 1954 Oldsmobile, and this was in 1954. My brother was 16. He had a driver's license.

She, my aunt, knew how to drive a car, so she had a leg up. Ms. Sumner didn't know anything about ATV's. My aunt knew what was involved in driving automobiles. She let me and my brother get in that car and my brother operated it, I wasn't old enough, in a very irresponsible manner. We had a severe accident and fortunately, and I thank God that I walked away from it. But if I would have been injured as severely as Ms. Sumner's son, would my parents be sitting here demanding General Motors recall Oldsmobiles?

To Dr. Narkewicz, there are virtually no reports of death or injury of children under 12 years of age riding child-sized ATV's. Do you realize the first victim of this boondoggle I will call it, because I have heard that word used today, is that Yamaha had in their product line, and I mentioned it in my testimony, a safe ATV. It had throttle restricter, and wouldn't go but 8 miles an hour, 10-foot cord on the back of it where a parent could walk around behind their child giving them direction, and if this got out of hand, they could pull the switch and the engine would die and the thing would come to a halt.

It wouldn't go more than 8 miles an hour. This was the first product to fall off because of this ATV witchhunt. We had one, and we let it go. Now, the kids are going to ride the big ones. OK. Thank you.

I want to get to actually my statement, if I may. I am from Festus, MO, and have been a Yamaha dealer since 1972.

Mr. **Barnard**. Is it possible that you might summarize your statement at this point?

Mr. **Surdyke**. No, I would like to read it. Everybody else has been allowed to.

Prior to that, I was a computer specialist for GE. For the better part of the last 4 years, I have been Yamaha's highest volume ATV dealer.

If you take the total business of the four major manufacturers and relate their ATV business to that total, I estimate that it is between 5 and 10 percent of their total business, the manufacturers' total business as we know. Like what Honda does with automobiles.

In my operation as a Yamaha Motorcycle-ATV-Scooter-Water Vehicle dealer, ATV and related business represents about 70 percent of my total business. I estimate that the national average among all dealers is closer to 40 percent.

I have sold 2,500 ATV's over 4 years and not one customer wants to return theirs, as stated earlier. Not one single customer of mine wants to return theirs. What is going on? Where is this public outcry?

The safety issue is one of perception rather than reality. There are approximately 200 deaths per year with 3 million ATV's in use; one-half are children, so that is 100 children. Statler said 43 percent. There were 30-plus children killed last year falling from bunk beds. A bunk bed is a stationary object for sleeping. ATV is motorized recreation, go-anywhere vehicle with speeds up to 50-plus miles per hour.

I am an American businessman with $2.5 million in sales, 70 percent from ATV's. I have 15 employees. I am one of 4,500 ATV dealers in the United States.

The real issue is, what is this false witchhunt doing to us? It may force me as it has forced many others to close and lay off my employees. The only people who are complaining about ATV safety are plaintiffs and their attorneys, and politicians and bureaucrats who are caught up in a political or public safety frenzy. I believe that not a single customer of mine is "anti-ATV."

I recently had the opportunity to meet with Clay Friedman, who is a deputy attorney general for the State of Missouri under Bill Webster. I and others met and discussed with him the ATV safety issue for about 2 hours. Many points were raised. As the last item of our meeting, we demonstrated and taught him how to ride an ATV.

Before he rode, he looked at me and asked me if this ATV hit this small bump, about the size of these cups, would it turn over? That question indicates the level of "knowledge of the subject" of the people who are attempting to strangle me. I demonstrated to his satisfaction that it would not.

After 30 minutes of riding an ATV after rider instructions, he said, "These things are fun." What if I could prove that children riding ATV's saves lives? I believe I can. Children learning to handle a motor vehicle in a relatively friendly environment, "off-road," make much better automobile drivers when they turn 16.

That question, the fact that this man is a lawyer and 30 years old and obviously intelligent, would have in his mind that somehow or another this ATV is going to go hit this little lump and turn over indicates the level of knowledge of the subject of the people attempting to strangle me. I demonstrated to his satisfaction it would not turn over.

I relate back to the story about me and my brother and Aunt Sophie's Oldsmobile. I assure you that I see this with my own children and with my customers' own kids. They are responsible. These things have social value.

I have stated my wife, Linda, and I have 10 children. So far, our five oldest children previously or currently work in our family farm—excuse me, I mean family business. We have a 9-year-old daughter with Down's syndrome. I pose this question:

How many children in the United States commit suicide each year? I submit, and it can be proven, and I offer it up for thought of intelligent people. If each of these children who committed suicide had an ATV, I bet you that number would have been reduced by 50 percent, and I can't prove that, but I can know it.

The Surgeon General's recent statement of children killed by accidents, 7,800 in a recent year. Well, we have pinpointed 130 of them, 100 ATV and 30 falling from bunk beds. Considering the nature of each, it becomes obvious bunk beds are the true hazard since a child gets in one to sleep, yet 30 of them last year were killed when falling from them.

The ATV safety issue is false. It is based upon the fact that 10 years ago, there were no injuries or deaths and now there are. Therefore, ATV's are unsafe. If this mentality had existed 100 years ago, we would be without many of today's necessities: Automobiles, airplanes and bicycles, and that list goes on and on.

The crisis is greatly exaggerated. In 1985, over 2 million ATV's were in use. As with any [illegible] there is a certain amount of inherent [illegible] pelled vehicle. With 2 million ATV's in use in 1985, there have been accidents involving [illegible]

I contend that the [illegible] compared with other [illegible] sledding accidents.

In 1985, there were [illegible] injuries due to riding ATV's. I believe that to accurately compare these statistics, it is necessary to develop an amount of use comparison. In other words, how much are they used?

To state the obvious, sledding can only be done when there is adequate snow cover. In two-thirds of the area of the United States, sledding does not take place at all in a given year. In the areas that do normally receive enough snow, sledding is even then not all that common in large numbers.

ATV's, on the other hand, are used extensively in all seasons. The State of Missouri even provides two State parks almost exclusively for ATV's: St. Joe State Park in Flat River and Finger Lake State Park in Columbia. There are currently over 3 million ATV's in the United States.

I believe that on any given Sunday at 3 p.m. in the afternoon, 20 percent, 600,000, of the ATV's in the United States are being ridden. On some days, especially holidays, the percentage of use is close to 80 percent, 2.4 million.

If the comparative usage for sleds and ATV's were reduced to a numeric ratio, I believe it would approach 200 to 1. For every 1 hour of sledding, there are 200 hours of ATV riding. If you take those numbers and actually used a factor of 50 to 1 rather than the 200 to 1, and using a factor of 50 to 1, you could deduct that ATV riding is 14 times safer than sleigh-riding.

There are two kinds of Congressmen, as far as I am concerned, on this issue. Those who have ridden them and those who haven't. Those who have, know what I say is true. Those who haven't don't know.

This committee voted straight party lines in December 1986 to demand that the CPSC ignore its own report and seek a ban and recall of ATV's. It is hard for me to believe that all the Democrats have not ridden ATV's and all the Republicans have.

You are sacrificing me, my 15 employees and all of the other 4,500 ATV dealers and their tens of thousands of employees with this false issue on the altar of partisan politics.

Thank you.

[The prepared statement of Mr. Surdyke follows:]

My name is Gary Surdyke. I am from Festus, Missouri. I have been a Yamaha dealer since 1972. Prior to that I was a computer specialist for G.E. For the better part of the last 4 years I have been Yamaha's highest volume ATV dealer.

If you take the total business of the 4 major manufacturers and relate their ATV business to that total, I estimate that it is between 5 and 10% of their total business. In my operation as a Yamaha Motorcycle-ATV-ScooterWater Vehicle dealer, ATV and related business represents about 70% of my total business. I estimate that the National average among all dealer is closer to 40%.

I have sold 2500 ATV's over 4 years and not one customer wants to return theirs.

The safety issue is one of perception rather than reality. There are approximately 200 deaths per year with 3,000,000 ATVs in use - 1/2 children = 100. There were 30+ children killed last year falling from bunkbeds. A bunkbed is a stationary object for sleeping. ATV is motorized recreation, go anywhere vehicle withspeeds up to 50+ MPH.

I am an American bueinessman with $2.5 Million in sales - 70% from ATV. I have 15 employees. I am one of 4500 ATV dealers in the U.S.A.

The real issue is - What's this doing to us? It may force me as it has forced many others to close and lay off my employees. The only people who are complaining about ATV Safety are plantiffs and their attorneys and politicians and burecrats who are caught up in a political or public safety frenzy. I believe that not a single customer of mine is "Anti-ATV".

I RECENTLY HAD THE OPPORTUNITY TO MEET WITH CLAY FRIEDMAN WHO IS A DEPUTY ATTORNEY GENERAL FOR THE STATE OF MISSOURI UNDER BILL WEBSTER. I AND OTHERS MET AND DISCUSSED WITH HIM THE ATV SAFETY ISSUE FOR ABOUT A 2 HOURS. MANY POINTS WERE RAISED. AS THE LAST ITEM OF OUR MEETING, WE DEMONSTRATED AND TAUGHT HIM HOW TO RIDE AN ATV.

BEFORE HE RODE, HE LOOKED AT ME AND ASKED ME IF THIS ATV HIT THIS SMALL BUMP, ABOUT THE SIZE OF A BASEBALL, WOULD IT TURN OVER? THAT QUESTION INDICATES THE LEVEL OF "KNOWLEDGE OF THE SUBJECT" OF THE PEOPLE WHO ARE ATTEMPTING TO STRANGLE ME. I DEMONSTRATED TO HIS SATISFACTION THAT IT WOULD NOT.

AFTER 30 MINUTES OF RIDING AN ATV AFTER RIDER INSTRUCTIONS, HE SAID, "THESE THINGS ARE FUN".
WHAT IF I COULD PROVE THAT CHILDREN RIDING ATVS SAVES LIVES. I BELIEVE I CAN. CHILDREN LEARNING TO HANDLE A MOTOR VEHICLE IN A RELATIVELY FRIENDLY ENVIRONMENT, "OFF ROAD", MAKE MUCH BETTER AUTOMOBILE DRIVERS WHEN THEY TURN 16.

THE EXPERIENCE I HAVE WITH MY OWN CHILDREN AND WITNESSING THE SAME THING WITH MY CUSTOMERS' CHILDREN CONFIRM THIS IN MY MIND.

WHAT IF YAMAHA DESIGNED AND MANUFACTURED AN ATV FOR SMALL CHILDREN who WEIGH BETWEEN 60 AND 110 POUNDS THAT HAD THE FOLLOWING FEATURES:

> A THROTTLE RESTRICTOR TO LIMIT THROTTLE
>
> A TAMPER-PROOF EXHAUST RESTRICTOR WHICH WOULD LIMIT SPEED TO 8 MPH.
>
> A TETHER CORD 10 FEET IN LENGTH CONNECTED TO A SWITCH ON THE REAR OF THE ATV THAT A PARENT COULD USE TO WALK BEHIND THE CHILD WHILE GIVING INSTRUCTIONS FOR PROPER USE. IF THINGS STARTED TO GET OUT OF HAND, THE PARENT COULD PULL THE TETHER CORD WHICH WOULD STOP THE ENGINE.

LET ME TELL YOU THIS ATV DID EXIST AND IT WAS THE FIRST VICTIM OF THIS MINDLESS ATV WITCHHUNT. YAMAHA DISCONTINUED IT BECAUSE IT IS DESIGNED FOR SMALL CHILDREN. NOW SOME OF THESE CHILDREN WILL BE LEARNING ON ADULT SIZED ATVS WHICH IS UNSAFE.

MY WIFE LINDA AND I HAVE A LARGE FAMILY - 10 CHILDREN. SO FAR OUR 5 OLDEST CHILDREN PREVIOUSLY OR CURRENTLY WORK IN OUR FAMILY FARM, EXCUSE ME, I MEAN FAMILY BUSINESS. WE HAVE A 9 YEAR OLD DAUGHTER WITH DOWN SYNDROME WHO OPERATES AN ATV. HOW MANY CHILDREN COMMIT SUICIDE EACH YEAR. IF EACH OF THEM WOULD HAVE HAD AN ATV I BET THE NUMBER WOULD HAVE BEEN REDUCED BY 50%.

SURGEON GENERAL'S RECENT STATEMENT OF CHILDREN KILLED BY ACCIDENTS - 7,800 IN RECENT YEAR. WELL WE'VE PINPOINTED 130 OF THEM - 100 ATV AND 30 FALLING FROM BUNKBEDS. CONSIDERING THE NATURE OF EACH, IT BECOMES OBVIOUS BUNKBEDS ARE THE TRUE HAZARD SINCE A CHILD GETS IN ONE TO SLEEP, YET 30 OF THEM LAST YEAR WERE KILLED WHEN FALLING FROM THEM.

THE ATV SAFETY ISSUE IS FALSE. IT'S BASED UPON THE FACT THAT 10 YEARS AGO THERE WERE NO INJURIES OR DEATHS AND NOW THERE ARE. THEREFORE, ATV'S ARE UNSAFE. IF THIS MENTALITY HAD EXISTED 100 YEARS AGO WE WOULD BE WITHOUT MANY OF TODAY'S NECESSITIES (AUTOMOBILES, AIRPLANES AND BICYCLES).

GREAT EXAGGERATION

THE CURRENT ATV SAFETY CRISES IS GREATLY EXAGGERATING THE REAL DANGER OF ATV USAGE IN 1977 THERE WERE NO ATV'S IN EXISTENCE, SO OF COURSE, THERE WERE NO ATV MISHAPS. IN 1985 OVER TWO MILLION ATV'S WERE IN USE. AS WITH ANY PHYSICALLY ACTIVE ENDEAVOR, THERE IS A CERTAIN AMOUNT OF INHERENT RISK INVOLVED IN OPERATION OF ANY SELF-PROPELLED VEHICLE. WITH 2 MILLION ATVS IN USE IN 1985, THERE HAVE BEEN ACCIDENTS INVOLVING DEATH AND INJURY.

I CONTEND THAT THE SAFETY RECORD OF ATVs IS NOT OUT OF LINE WHEN COMPARED WITH OTHER ACTIVITIES. FOR EXAMPLE, ACCORDING TO THE NATIONAL SAFETY COUNCIL IN 1986, 24,347 INJURIES WERE REPORTED DUE TO SLEDDING ACCIDENTS. IN 1985 THERE WERE 85,900 INJURIES DUE TO RIDING ATVs. I BELIEVE THAT TO ACCURATELY COMPARE THESE STATISTICS, IT IS NECESSARY TO DEVELOP AN AMOUNT OF USE COMPARISON.

TO STATE THE OBVIOUS, SLEDDING CAN ONLY BE DONE WHEN THERE IS ADEQUATE SNOW COVER. IN TWO THIRDS OF THE AREA OF THE U.S., SLEDDING DOES NOT TAKE PLACE AT ALL IN A GIVEN YEAR. IN THE AREAS THAT DO NORMALLY RECEIVE ENOUGH SNOW, SLEDDING IS EVEN THEN NOT ALL THAT COMMON IN LARGE NUMBERS.

ATVs ON THE OTHER HAND ARE USED EXTENSIVELY IN ALL SEASONS. THE STATE OF MISSOURI EVEN PROVIDES TWO STATE PARKS ALMOST EXCLUSIVELY FOR ATVs-- ST. JOE STATE PARK IN FLAT RIVER AND FINGER LAKE STATE PARK IN COLUMBIA. THERE ARE CURRENTLY OVER 3 MILLION ATVs IN THE U.S.

I BELIEVE THAT ON ANY GIVEN SUNDAY AT 3 P.M. IN THE AFTERNOON 20 PERCENT (600,000) OF THE ATVs IN THE U.S. ARE BEING RIDDEN. ON SOME DAYS, ESPECIALLY HOLIDAYS, THE PERCENTAGE OF USE IS CLOSE TO 80% (2,400,000)

IF THE COMPARATIVE USAGE FOR SLEDS AND ATVs WERE REDUCED TO A NUMERIC RATIO, I BELIEVE IT WOULD APROACH 200-1. (FOR EVERY ONE HOUR OF SLEDDING THERE ARE 200 HOURS OF ATV RIDING).

FOR PURPOSES OF COMPARISON LETS ASSUME THE RATIO IS ONLY 50-1.

INJURIES - USE FACTOR - PROJECTED INJURIES IF USED EQUALLY
SLEDDING 24,347 x 50 = 1,217,350. ATVs 85,900 x 1 = 85,900.

WHEN YOU DIVIDE PROJECTED SLEDDING INJURIES (1,217,350) BY ATV INJURED (85,900), IT INDICATES THAT A CHILD SLEDDING IS OVER 14 TIMES AS LIKELY TO BE INJURED AS AN INDIVIDUAL RIDING AN ATV.

THIS SAME COMPARATIVE ANALYSIS, WHEN MADE WITH OTHER ACTIVITIES, ROLLER SKATING WITH 112,398 INJURIES IN 1986, WILL RESULT IN THE SAME CONCLUSION.

THE ATV SAFETY ISSUE HAS BECOME A POLITICAL ISSUE IN WASHINGTON. THE CPSC PERFORMED A TWO-YEAR MULTI-MILLION DOLLAR STUDY OF OVER 13,000 PAGES. THE STUDIES RECOMMENDATIONS WERE RATHER MILD. IT REQUESTED THAT THE MANUFACTURERS STOP PRODUCTION OF MODELS FOR CHILDREN UNDER 12 YEARS OF AGE AND STANDARDIZED CONTROLS AND SAFETY MARKINGS BE INSTALLED ON NEW PRODUCTION.

THIS DID NOT PLEASE ONE OF THE CPSC COMMISSIONERS, STUART STATLER. THIS MAN HAD PUBLICALLY CALLED FOR THE TOTAL BAN AND RECAL OF ALL THREE-WHEELED ATVS BEFORE ANY STUDY HAD BEEN UNDERTAKEN. IN THE FALL OF 1986, WHEN IT BECAME APPARENT THAT THE STUDY WOULD NOT SUBSTANTIATE COMMISSIONERS' STATLER'S CLAIMS HE RESIGNED IN AN UPROAR.

HOW MANY OF YOU CONGRESSMEN HERE TODAY HAVE PERSONAL ATV EXPERIENCE (YOU'VE RIDDEN ONE YOURSELF FOR MORE THAN L HOUR)?

THERE ARE TWO KINDS OF CONGRESSMEN ON THIS ISSUE. THOSE WHO HAVE RIDDEN THEM AND THOSE WHO HAVEN'T. THOSE WHO HAVE, KNOW WHAT I SAY IT TRUE. THOSE WHO HAVEN'T, DON'T KNOW.

THIS COMMITTEE VOTED STRAIGHT PARTY LINES IN DECEMBER '86 TO DEMAND THAT THE CPSC IGNORE ITS OWN REPORT AND SEEK A BAN AND RECALL OF ATV'S. IT'S HARD FOR ME TO BELIEVE THAT ALL THE DEMOCRATS HAVE NOT RIDDEN ATV'S AND ALL THE REPUBLICANS HAVE.

YOU ARE SACRIFICING ME - MY 15 EMPLOYEES AND ALL OF THE OTHER 4500 ATV DEALERS AND THEIR 10'S OF THOUSANDS OF EMPLOYEES WITH THIS FALSE ISSUE ON THE ALTAR OF PARTISIAN POLITICS.

GARY SURDYKE
1988 JANUARY

Mr. **Barnard**. Mr. Craig.

Mr. **Craig**. Thank you very much, Mr. Chairman.

Mr. Rubin and Mr. Surdyke, thank you for your testimony. It has been interesting to listen to you and to watch the audience, because what you are talking about has no emotional pizzazz in it. Shame on you for just dealing with facts and figures and statistics. That is unfair when we are talking about life.

But it is fair when we are talking about decisions that are necessary and enforceable and reasonable in the course of conducting our business or any area of the Federal Government doing the same in a responsible fashion. I thank you for that style of testimony.

It is an interesting divergence from the kind of testimony that we have heard this morning, but both types of testimony are important in the ultimate decisionmaking process in dealing with this issue.

Mr. Rubin, ban versus recall. Now, I tried to follow all of your statistics, and I can understand why people like you exist. It is so that the Commissioners and Congressmen and people who have to make public decisions read your figures and attempt to balance them in the decisionmaking process.

You said the probability of death on ATV's you were talking about risk levels—you mentioned motorcycles as compared to ATV's. Could you refer back to that, and specifically, what did you mean? You are saying that motorcycles are more dangerous than ATV's?

Mr. **Rubin**. There is a much higher risk involved in motorcycles. The goal is to try to get some measure of the risk that people are willing to accept on recreational vehicles. Motorcycles are used differently, but they are a recreational vehicle and a much greater risk than ATV's.

Mr. **Craig**. When you calculate risk of ATV's and motorcycles, the factors you consider make me curious. Let's consider the following: You have a motorcycle over here, and it is a certain type of machine, and it is by its very nature a licensed machine in almost all circumstances.

You have an ATV over there, and it is a uniquely different machine in some ways, and it is a nonlicensed machine. Do you factor in the licensure issue in your calculations?

Mr. **Rubin**. Very simply look at the actual risks, and the best measures we had of actual usage.

Mr. **Craig**. So, you are saying that even though motorcycles are licensed and ATV's are not, ATV's are an inherently more dangerous machine?

Mr. **Rubin**. As it is used, it would be associated with a higher level of risk, that is correct.

Mr. **Craig**. You made another interesting statement because what is being discussed here is recall versus nonrecall. You mentioned recall does not grant the owner options he does not already have. Are you talking primarily in the ability to be compensated for something he purchased that he wished to get rid of under this environment we are dealing in?

Mr. **Rubin**. That is correct. He can be compensated by the manufacturers or he can sell the vehicle in the used market and get its current value. So, in either case, he can exchange the used vehicle for its cash value today.

Mr. CRAIG. Only in a total ban would that be an impossibility, I mean, in the marketplace. We are talking, in a total ban, I would understand the manufacturer buying back all the machines in the marketplace.

Mr. RUBIN. As people said before, manufacturers could offer to buy them back, but I haven't heard anyone propose compulsion to sell. I have heard it discussed, but it is something no one is thinking about.

Mr. CRAIG. Seventy percent of the American public—current owner users—say they don't want to sell it.

Mr. RUBIN. So even in the case of a ban, that would not be an effect, I think.

Mr. CRAIG. With all your facts, figures and statistics, let's get back to the issue that is really important in all of this: Human safety. I don't think any of us dispute that. Some of us may dispute figures, but none of us dispute the legitimacy of being concerned about human safety.

Under the current procedure, under the decision of the Consumer Product Safety Commission to settle versus going to court—and we just don't know for sure—we can attempt to project based on other types of court processes that involved a similar kind of issue that was out there. It could be 2, 3, 4 years before a decision is made, and ultimate action taken.

Given the option that is now before us, that the Commissioners will make a decision in early February, versus litigation, let's talk safety. Do you see in this settlement approach we are now taking safety factors that are not available in the market today?

Mr. RUBIN. The training programs, the extra warnings and notice and so forth, those things are aimed at producing safety. In my view, the litigation would probably take time and the stock of used ATV three wheelers is going to be aging over that period. Three or 4 years down the road there will be simply not that many of them to recall. It would not take much effectiveness of the program we are talking about now to have a greater impact on safety than the recall in 3 or 4 years.

Mr. CRAIG. We are also involved, are we not, in a declining injury situation now? Is it not true statistically we see a substantial difference from 1985 to 1987 as it relates to injuries versus number of vehicles?

Mr. RUBIN. The injuries are going down for several reasons. The shift from three to four wheelers, by the way, is an indication of strong market forces. Commissioner Pittle said before that education never worked, but in fact consumers have learned about the safety of these four wheelers and have come to demand them.

Anyway, going to the four wheelers, and also the fact that we know that inexperienced riders are much more at risk, and as the stock of vehicles out there changes and the stock of riders has had more experience, we predict and are observing a substantial decrease in injuries over time.

Mr. CRAIG. The question of a voluntary recall versus an outright ban, assuming a voluntary recall were instituted and manufacturers were required to buy back from those who chose to sell back, and under that scenario, it was estimated or anticipated that that vehicle could then go back into the market, maybe with different stickers, warnings on it, and stronger safety requirements. If this were the case, it could be argued that this remedy might result in an inherently dangerous situation because you are talking about a new consumer coming into the market to buy that used ATV, probably at a considerably less price because of the nature of the market. As a result of a voluntary recall, in the first month of operation of the ATV, a newly experienced or inexperienced operator has a 13-time greater risk of injury than one who has had that month's worth of operating experience.

I know it was true with my teenage son when he first started driving. There were a lot more dents in the car during the first month of operation than the second month. I learned a real lesson about it at that time, but be that as it may, is that a valid figure? Is that a valid concern that one might fudge the safety figures a bit?

Mr. **Rubin**. It depends on the recall price. If the recall price is the current used price, there would not be much effect, because you would simply switch. Instead of being traded on the used market, it would be traded through the dealer in the used market. If the recall price is higher than the current used price, then that would be a real concern because you would get some vehicles turned in that otherwise the current owner would have kept, and those vehicles would then have to be resold at a lower price.

Mr. **Craig**. Opportunity to profit, in other words, would send more vehicles to the market?

Mr. **Rubin**. I think so. And the owners that turn theirs in would probably buy one anyway since they were people with a preference for owning the ATV. If the price were higher than the going price, it is clear you would end up with more injuries.

Mr. **Craig**. Thank you very much.

Briefly, Mr. Chairman, and I appreciate your indulgence, Mr. Surdyke, it is unusual for you to come and defend your right to be a businessman in this country, and I appreciate you for it. There are 40,000 employees and employers in this industry across the country, and I interestingly note that you picked up on the use of foreign and Japanese more than once in other testimony heard here this morning. I made note of it, scratched my head and said surely not, surely we wouldn't attempt to use the prejudice of a foreign manufacturer in this environment, that would be unfair to try to prejudice this whole issue based on the fact that somebody else other than America produces these vehicles, but apparently your thoughts were there too. And I did make note of that. Forty thousand people, and I appreciate you saying American-owned companies. You have a prejudice, you didn't hide it, you wore it on your sleeve, that is fine. You have a right to do that.

Now, you also have made a very interesting statement, and there were snickers and smiles across this audience when you talked about a social value to the ATV. That is a strange form of argument to be heard before this body. I would like to ask you to expand on that just a bit. I think I know where you are coming from, but I want to make sure. Where is the social value in owning something that kills people?

Mr. **Surdyke**. Let's go back to one of those nasty commercials that talk about generation gaps. I think it was Yamaha. It was a great commercial, and it showed a father and son enjoying this activity together. That is social value, it is true. I do this with my children. I have heard you state, I believe, that you do it with yours.

My clientele—you would be amazed how many 60-, 65-year-old people are buying ATV's. You would be amazed, because it gives them legs, and by the time you get to that point, a lot of people's legs aren't left. At least I don't think mine will be. I had to go to the emergency room a week and a half ago; I sprained my knee playing volleyball. But there is social value. It is a family activity. That is the way it is done. I have had many, many families where it started with one, and before long, it is two, three and four, it is all the cousins, brothers and families, and they go out on a camping trip on the weekend and take their ATV's, and they have a great time. That is social value. It brings people together. It is awfully hard in this day and age to find something that could interest a father and son together. That is social value.

The thing about children committing suicide, I believe in my heart that is true.

Mr. **Craig**. As a father of 10, you probably ought to know a little about that.

Mr. **Surdyke**. Amen.

Mr. **Craig**. I believe licensure is important and age is important as it relates to driving, clearly the larger machine, and it is true the statistics show child injuries result in children riding machines not designed for them. I would like your reaction to that and to State licensure. You operate in the State of Missouri, do they require licensure and are there age restrictions?

Mr. **Surdyke**. There are no age restrictions in Missouri as pertains to the use of an ATV on private property or on certain public properties, trails, State and National forests that are open to the ATV's. There is no licensing done. In one of the State parks, in fact, both of the State parks, there are requirements as far as they have to be attended with an adult, a parent.

When we talk of licensing the ATV operators generally speaking, ATV's are not legal on the streets and highways of the United States. The Missouri Legislature screwed up about 2 years ago and tried to define them as not being motor vehicles, which in turn ended up putting ATV's on the roads. There were incidents of children, and it is amazing the dealers, we knew about this right away, but we didn't say a thing about it. We didn't tell our customers—I had people say can you ride these things on the street? And I said, no. All the other dealers I know of said no. But you know how word comes out. Suddenly this whole ATV thing got caught up and someone is trying to come up with something, there has been a couple on the street, the next thing you know the press is doing stories.

I had a local paper come to me, the fellow who done the story said, I have done this story on ATV's on the street, but I am having difficulty finding one on the street I can take a picture of. I said that is indicative of the necessity of your story, you can't find anyone on the street riding it, it must not be much of a story. He asked if I could go out and ride one up and down the street. Once this became knowledge in Missouri, people are riding them on the road.

To get back to the thing on licensing, I don't know how you can license them for private property. To say there is some method of licensing that would work for those public off-road lands that are open to ATV's, I don't think it is a workable solution. I think the whole idea that a small child under adult supervision, parental supervision can't handle one of those things flies in the face of Nadia Comaneci and all these unbelievable things these young people do. If a child can learn to walk by the time he is 12 months old coming from the womb, he can learn to ride an ATV under the right circumstances. To come up with numbers and say, you are this age, you can't—if your children are going to ride them, if children are going to ride them, it is important they have ones available to them designed for children.

Mr. Craig. I am going to have to say thank you, very much. We wish we could go on with this discussion. Time is ticking on and the chairman has questions too.

Mr. Barnard. Thank you, Mr. Craig.

I really don't have a lot of questions, mainly because we need to get on—not that I am belittling the testimony of either of you gentlemen. Much that we have gone over here has been gone over time and time again. I mean that has been done before. That has been considered by this committee, it has been considered by the Consumer Product Safety Commission and it doesn't take any browbeating on our part for the Consumer Product Safety Commission in 1986, in December, to unanimously, unanimously, condemn these vehicles.

So let me say this. You are wrong, very wrong in trying to make this a political issue. You are right, it was a decision, a partisan decision on this committee, and that is all well and good. That is the way we work here. But it was not a partisan decision when the Consumer Product Safety Commission made their decision in December 1986. It was unanimous.

You have seen here this morning, we happen to have two Republicans and one Democrat testifying this morning. Now, if my evaluation is correct, the most vociferous condemnation of these vehicles came from the Republican. So, I resent as chairman of this committee, who has tried to be very fair in these hearings over the last 2½, now 3 years, for you to tell me it is partisan. It is not partisan. And certainly we haven't divided the number of Democrats, Democratic children killed versus the Republican children killed.

Now, I respect you for being here this morning. You have done something that the Japanese manufacturers would not do. They would not come before this committee today and tell us what they were doing to make these vehicles more safe. Yet the number of sales goes up all the time.

Dr. Rubin, I want to ask you a question. When you were with the Commission, do you ever recall preparing a memorandum which supported a ban on three wheelers?

Mr. Rubin. We prepared a memorandum where we indicated the numbers I just gave you today, the cost of injuries were $650 and the cost of the third——

Mr. Barnard. The memorandum supported a ban on three wheelers?

Mr. Rubin. Yes.

Mr. Barnard. Good. That is all I wanted to say. That is the viewpoint that you made when you were a member of the Commission.

I would like to ask you a question. I do understand what cost benefits are all about, but I have never been able to put a cost or benefit on a life. What is the cost or benefit on 20 people killed per month even if they have 10 children? What is the price on one child? How do you calculate that?

Mr. Rubin. That is obviously a very, very difficult issue——

Mr. Barnard. I am just saying it can't be done, and that is what we are trying to do with your testimony today. We are trying to put a computer in the place of good judgment. Somebody said the other night that ideology cannot replace common sense, and sometimes I think that is what we have is an ideology. The fact is we don't want big Government in our business, we don't want to be told by big Government what to do and yet, of course, we have lives that we have to take into consideration. It just moves me to wonder how we can put calculations in the place of lives and that is where we are this morning. With that I would say——

Mr. Rubin. Could I make one point?

Mr. Barnard. Yes.

Mr. Rubin. Most of what I discussed this morning didn't deal with lives.

Mr. Barnard. That is right. Figures, costs——

Mr. Rubin. No, sir. The point is most of what is going to happen is replacing of three wheelers with four wheelers and the data does not——

Mr. Barnard. I couldn't care less about that. I am thinking about trying to protect the lives of the children of this country, and that is what my objective here is this morning.

Mr. Surdyke. If I could prove to you ATV use saves lives, would you change your mind?

Mr. Barnard. You have all had the opportunity to prove that before the Consumer Product Safety Commission and this committee, the Energy and Commerce Committee, and you haven't done it.

Mr. Surdyke. This is the first opportunity I have had other than going to a public meeting in Jackson, MI, to state anything. I don't recall anybody asking dealers to participate in this thing. You say it is nonpartisan, when I say partisan, I am talking about when this committee voted in December 1986, straight party lines to demand the CPSC do things and then they quickly went and voted.

I think if you had not voted on straight party lines politically motivated, getting Reagan, the CPSC would not have went to the Justice Department.

Mr. Barnard. I think that is completely irrational.

Mr. Surdyke. What do you think, Mr. Craig?

Mr. Barnard. You are not asking the questions.

Mr. Craig. Mr. Chairman, I will make a comment.

Mr. Barnard. The gentleman is out of order.

Mr. Craig. Oh, is he?

Mr. Barnard. You are not asking the questions. We are asking the questions. Let me ask you this: Where are the societies representing the ATV owners of America? We had a bunch of young fellows come in here, very handsome, dressed up, they were competitive riders of ATV's and what did they have? They had helmets on, they had specially prepared suits, they had elbow pads, knee pads, and I haven't seen any manufacturer saying that is what you ought to do to ride one, and I bet most kids are not equipped like that.

Mr. Surdyke. It depends upon what they are doing. I will offer this up. I happen to [illegible] Saab [illegible] an SC [illegible]. When I get in that [illegible] I put on my helmet, my gloves, my [illegible] holding me up. OK? It is an automobile. I also have an Escort I run down to the corner to get the mail. I might do that in my tennies and swimming suit and do anything. And the reason is because it depends upon how you use it.

The most enjoyable time I have on the back of an ATV is riding with my kids in the gravel bars at slow speed with swimming suits and tennis shoes going slow. You can't tell me I have to put on all this gear to be safe. That doesn't make it safe.

Mr. Barnard. There is no comparison to that with an innocent parent going to a dealer, the dealer telling him he can ride a 250cc, he can ride it double, he doesn't have any special equipment, he doesn't have to have—that has been documented.

Mr. Surdyke. You mean that television thing?

Mr. Barnard. Sure it was.

Mr. Surdyke. That was a setup if I ever saw one. Here you have this jock father and his jock sons come walking in there and the dealer tries to sell him one, and dad says, oh no, I think my kids can handle this one. What do you think?

Mr. Barnard. That is very typical of those who buy them today for the children. Thank you, very much.

Mr. Surdyke. Thank you.

Mr. Barnard. At long last we now get to the Commission. I would like to ask the Commission to come forward to the witness stand. We will only have the three Commissioners seated at the table, and I would like to reserve the next row for the staff that will be accompanying the Commission.

I dislike asking you to move. If you would, please make room for the staff of the Commission.

Mr. Craig. Mr. Chairman, while the Commissioners are being seated let me make an observation. Mr. Surdyke is certainly entitled to his own opinion, I would have to say, if you look strictly at the vote it would have been possible not knowing the debate, or the discussion or involvement, or the inner working of staffs to say it was partisan.

I will have to say that the vote was a party line vote. I do not believe in this instance it represents partisanism per se. I would say that it does represent a philosophical difference in how we approach issues here from time to time, but it did not represent a partisan vote from the standpoint of how it appeared.

Mr. Barnard. Thank you very much. That was very fair and I appreciate your comment. This afternoon we will hear from the

Chairman of the Commission, Mr. Scanlon, Ms. Dawson, and Ms. Graham.

I would like to request, although I do not want to limit the testimony, I would like very much if I could limit the testimony to a summary of what your testimony is. Without objection your entire testimony will be entered into the record, and hopefully give us an opportunity to have time for questioning.

Mr. Chairman, we will recognize you first, and then your associates.

STATEMENT OF TERRENCE SCANLON, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Mr. SCANLON. Mr. Chairman and Members of the subcommittee, I am pleased to come before you today to explain the Consumer Product Safety Commission's actions to reduce the unreasonable risks of injuries posed by ATV's. With all respect, Mr. Chairman, much of the testimony presented thus far has included mistaken perceptions about the ATV record and mistaken conclusions about the recent preliminary consent decree and how it will prevent deaths and injuries.

In the course of our testimony and answers to your questions, I hope we will be able to answer many of these. I will abbreviate my remarks, appreciating as I do the opportunity to explain the rationale for supporting the Commission's recent decision to support a settlement of safety issues associated with ATV's.

Since 1982, there have been at least 883 deaths and almost 350,000 injuries associated with these three- and four-wheeled off-road machines. Nearly half of those affected have been children under 16, almost one-fifth have been youngsters under 12 and quite a few of the injured have been crippled for life. That is the toll of tragedy that no one can ignore.

Clearly, action was, and is, needed to reduce the risk of injury associated with these very popular machines, especially with such a vulnerable population as young children involved. The big question is: What form should that action take? Speaking for myself, I am convinced that the agreement with the ATV industry announced December 30, 1987, was the most responsible alternative available. Not only do the resulting preliminary consent decrees put their emphasis where it will do the most good, but that emphasis should be felt almost immediately rather than 3 or 4 years down the road as would have been the case if the Commission took the ATV industry to court. Moreover, there is nothing in the settlement that says the Commission can't pursue other remedies if the terms fail to produce the desired results. Quite the contrary in fact.

Keeping in mind that operator misuse—such as riding under the influence of alcohol, on paved roads, at excessive speed, or with passengers—accounts for a significant portion of the ATV-related accidents, let's look for a moment at, one, who is at the greatest risk when riding an ATV, two, what impact this negotiated settlement will have on those riders, and three, what effect an ATV repurchase proposal would have had on the same people.

As the Commission learned from its special, 18-member task force which spent 18 months and roughly $2 million examining the hazards associated with ATV's, the people most at risk are inexperienced riders, youngsters under 16 operating adult-sized machines, and individuals riding three-wheeled ATV's. A novice rider, for instance, is at 13 times greater than average risk the first month he or she rides and at 3 times above average risk the first year. Similarly, a 12- to 15-year-old youngster riding an adult-sized ATV is at one and one-half to two times the normal risk. The same ratio exists for the person riding a three-wheeled ATV instead of a four-wheeler.

For the record, the preliminary consent decrees negotiated last month not only address each of these major risk factors, but their terms are supported by the findings of the Commission's ATV Task Force. For example, the ATV industry is to advertise and provide, subject to our approval, hands-on rider training at no additional cost to all new purchasers of ATV's, their immediate families, and all families who purchased an ATV in the previous 12 months.

If effectively implemented, this training will help address the inexperience factor cited by our Task Force and, based on past precedent with motorcycle rider training, could reduce accidents by upwards of 20 percent among those who take it.

Also, to deal with the concern for children under 16, cited by our Task Force as well as others, the industry has agreed to discourage the sale of adult-sized ATV's over 90 cc's to youngsters under 16. On top of that, the ATV distributors have consented not to sell any more three-wheeled ATV's until an engineering performance standard acceptable to the Commission has been developed, plus they have agreed to repurchase all three-wheelers remaining in dealers' inventories.

In addition to the reduction in ATV-related injuries we have seen since 1986—and that is from 86,400 to 77,400 in 1987—past, present, and future Commission efforts, including participation in the settlement, are expected by our staff to reduce such injuries almost 30 percent by 1992. And that estimate does not take into account the effect this settlement may have on States which might be encouraged to adopt or expand remedial legislation in areas, such as helmet usage, which are outside the jurisdiction of the Consumer Product Safety Commission.

Also, keep in mind that, while the number of injuries per year is expected to decrease by 1992, the total number of ATV's in use is projected to rise to 2.8 million. Thus, in 1992, the likelihood of injury on an ATV's should be roughly one-third lower than it was in 1987, and less than half what it was in 1985.

Two other points should be made with respect to the potential impact of this agreement, both dealing with the recall-repurchase alternative that a majority of the Commission endorsed last year and then rejected last month.

First, such an alternative would almost assuredly be contested by the industry, with the result being 3 to 4 years of litigation, the outcome of which is uncertain. Not only that, but during the course of the litigation, few, if any, remedial measures would be undertaken by the industry, to the detriment of ATV riders and their families.

Second, if the recall-repurchase option were to be achieved after a court fight, it might well result in an increase rather than a decrease in deaths and injuries. Why? Because, when the returned vehicles were resold, they would likely be bought by inexperienced or less experienced riders who, as noted previously, are more at risk.

Prohibiting resale, on the other hand, would be tantamount to a ban on the sale of three-wheeled and certain four-wheeled ATV's, something that under existing statutes would require the Commission to disprove the effectiveness of other, less drastic alternatives.

Since there is reason to believe, based on the information we have available, that other remedies, such as those described in the preliminary consent decrees, would indeed reduce ATV-related deaths and injuries, why not give this negotiated settlement a chance? There is much to gain and little to lose by doing so, whereas if the Commission goes to court in pursuit of a more drastic but potentially less promising remedy, the reverse is likely to be the case.

I thank you. I would be happy to respond to your questions at the appropriate time.

[The prepared statement of Mr. Scanlon follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

CHAIRMAN TERRENCE SCANLON'S TESTIMONY
ALL-TERRAIN VEHICLE (ATV) SAFETY
HOUSE SUBCOMMITTEE ON COMMERCE, CONSUMER
AND MONETARY AFFAIRS
2154 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C.

January 28, 1988

Mr. Chairman, and Members of the Subcommittee:

This Commissioner and, I believe, the entire Consumer Product Safety Commission (CPSC) has been deeply concerned over the rising toll of deaths and injuries associated with all-terrain vehicles (ATVs) ever since that toll first became apparent in 1984. In my case, the realization that nearly half of these deaths and injuries have involved children under 16 and that a sizeable percentage -- almost 20% -- have involved youngsters under 12 has reinforced my concern. Indeed, the spectre of those too young to fully recognize, much less respond to, the rigors of ATV ridership had much to do with my vote and, I believe, the Commission's decision to launch what has turned out to be one of the most thorough and expensive product safety risk assessments in its fifteen year history.

Given this background, I appreciate having an opportunity to explain the Commission's recent decision to enter into a tentative agreement with the ATV industry -- an agreement which, I believe, will significantly enhance ATV safety. But, before I go any further, let me make it clear that the views which follow are personal in nature and do not necessarily reflect the opinions of my two colleagues on the Commission.

Once it became apparent that there was a safety problem associated with ATVs, the Commission began investigating accidents involving these vehicles. It also met with representatives of the industry, who promised to provide rider training to some 5,000 ATV purchasers the first year, over 40,000 the second year and significantly more from then on. Subsequently, the results of the 169 in-depth investigations that were conducted suggested that additional ATV safety measures were necessary, prompting the Commission to take two additional measures in the spring of 1985. One was to issue an Advance Notice of Proposed Rulemaking (ANPR), our first in several years, thus alerting all interested parties that the Commission was going to consider a broad range of corrective measures ranging from voluntary standards development to the possibility of filing an "imminent hazard" action under Section 12 of the Consumer Product Safety Act (CPSA). The other was the creation of a special 18 member (6 of whom worked full time) staff Task Force on ATVs to conduct an extensive 18 month investigation into probable causes of, and potential remedies for, the growing number of ATV accidents. Statistical, medical, engineering, human factors and other information was to be obtained from a wide variety of sources, including a nationwide series of public hearings conducted by the Commission itself. Six of these hearings were subsequently held, generating highly valuable direct and indirect publicity on ATV safety which, I personally believe, had much to do with the leveling-off of, and then the decline in, the number of ATV injuries. In 1987, for instance, the Commission estimates that there were approximately 11% fewer ATV-related injuries than there were in 1985 and 1986.

The Commission's ATV Task Force completed its work, as scheduled, on September 30, 1986 having spent roughly $2 million in the process -- a very large sum for the CPSC. Among other things, it found that 3-wheeled ATVs were more likely to tip over than 4-wheeled ATVs, that suspension systems play a major role in ATV handling, that children under 16 operating adult-size ATVs were at greater than average risk, that operator misuse (such as driving with passengers, under the influence of alcohol or on paved roads) was a substantial factor in ATV accidents, that the voluntary standard proposed by industry was inadequate and, most importantly, that rider inexperience was the single, greatest risk factor associated with ATV accidents.

To address these concerns, this ATV Task Force, consisting of career CPSC professionals from various directorates, recommended that the Commission proceed with the issuance of mandatory warning requirements, age labeling notices and the research necessary to develop performance standards for adult-size ATVs. It also recommended that the Commission launch a comprehensive information and education program on the dangers associated with riding an ATV and that the CPSC work with states and other federal agencies on the development of safety measures (such as helmet laws) that the Commission does not have the authority to implement. Finally, the Task Force endorsed rider training and suggested, based on the medical and human factors evaluations it had received, that the Commission ask the ATV industry to cease selling ATVs intended for use by children under 12 on its own initiative.

In retrospect, what our ATV Task Force did not recommend is every bit as, if not more, important as the corrective measures it did suggest. For the record, the Task Force did not suggest either a total ban on the sale of 3 wheeled ATVs or refunds to past purchasers of either 3-wheeled ATVs or 4-wheelers intended for use by children under 16. To the contrary, its report specifically stated (see page 20 of the Executive Summary) that since "... the ATV Task Force cannot demonstrate that a consumer product safety standard is not feasible, a ban of 3-wheeled ATVs...is inappropriate". Indeed, the closest the ATV Task Force came to suggesting a ban on 3 wheeled ATVs, or refunds for either 3 or 4 wheelers, was a ban on the sale of ATVs intended for use by children under 12 if the ATV industry refused a request to cease marketing such models on its own.

This is not to suggest that the Commission should have limited its consideration of potential remedies to those suggested by its ATV Task Force. Nor did the Commission so restrict itself as a review of various memoranda on enforcement options, issued between September 30th and December 12, 1986, makes clear. Rather, my reason for elaborating on the the ATV Task Force recommendations is to put the terms of the tentative settlement of December 30, 1987 in better perspective. Some people have suggested, for instance, that certain aspects of this settlement, notably the voluntary commitment not to market 3 wheeled ATVs until strict new performance standards have been developed, are essentially meaningless since 3 wheeled ATVs are no longer being manufactured. However, when viewed from the perspective I just outlined -- not to mention the 40,000 or so 3 wheeled ATVs currently in the inventories of dealers and their distributors -- it clearly can be argued that withdrawal of new 3 wheeled ATVs from the market is a useful concession the Commission might not have won had it decided to take this case to court. Like it or not, the Commission, and everyone else with an interest in this case, has to be cognizant of the record that has been developed with respect to ATVs and the options for dealing with them. To overlook that record, in my opinion, is to invite protracted litigation at the expense of safety measures that might otherwise be taken in the meantime.

Hopefully, the question of whether the repurchase portion of Commission's December 12, 1986 decision on ATVs would stand up in court will never be put to the test. Personally, it is my feeling that notice, warning and training aspects of that decision were and are supportable, especially in light of the industry's inability to arrive at an acceptable voluntary standard and its dismal failure to make good on its earlier promises of rider training. Therefore, I favored a Section 12 action to achieve those ends. However, I did not believe then, nor do I believe now, that the factual record, as compiled by our ATV Task Force, would have sustained a so-called "voluntary" recall of all 3 wheeled ATVs or of 4 wheelers purchased for use by children under 16. Aside from the fact that such a recall would be anything but voluntary from the manufacturers' standpoint, the fundamental flaw in this "remedy" was, and is, this: the machines that were returned could be resold, in which case they would likely be acquired by inexperienced or less experienced riders who, if novices, would be at 13 times greater than average risk the first month and 3 times higher than average risk the first year they operated that ATV. Thus, such a "voluntary" recall requirement is likely to be counterproductive from a safety standpoint. But to prohibit resale of returned vehicles would be tantamount to a ban on the sale of all 3 wheeled and certain 4 wheeled ATVs which, as I mentioned earlier, would require the Commission to disprove the potential effectiveness of other less drastic remedies, something I personally doubt the Commission could do. Moreover, were the Commission to continue to insist on the repurchase remedy, the likely result would be three or four years of litigation, during the course of which other potential ATV safety measures would be put on hold and the toll of death and injuries associated with ATVs -- which averaged 20 and 7,000 per month respectively in 1985 and 1986 -- would continue to mount. Personally, I could not support such a gamble, especially since success in court would likely mean less rather than more ATV safety, and am glad that it has not been taken. If past purchasers of 3 wheeled and certain 4 wheeled ATVs wish to dispose of their vehicles without taking a total loss, there is nothing to prevent them from selling their machines on the existing, and very viable, used ATV market. To delay other ATV safety benefits so that resale could be made more convenient or more lucrative -- which is what I suspect we are talking about here since repurchase provisions [illegible] market value [illegible] supply of resale ATVs [illegible] hard for me to [illegible] However, [illegible]

Before going any further, I should mention that on December 18, 1986 the CPSC took a number of other steps to promote ATV safety that, for the most part, will proceed regardless of the terms of any final consent decree. For instance, the Commission directed its staff to share ATV safety information with states and other federal agencies so as to encourage the adoption of state legislation or other regulations designed to promote greater ATV safety. That may not sound like much but, when you consider that certain remedies -- such as requiring ATV riders to wear a helmet, get a license before operating an ATV, take a training course in order to get that license, and suffer penalties for certain types of behavior (such as driving an ATV under the influence of alcohol, with passengers or on paved roads) -- can only be achieved through state legislation, the significance of these actions becomes clear. Keep in mind that the CPSC's own ATV Task Force found that 30% of all fatal accidents involved alcohol use, 30% involved excessive speed, 25% of all those who died from head injuries could have been saved by the use of a helmet, and 31% of all ATVs involved in accidents were carrying passengers.

I am happy to report that, since December 18, 1986, our staff has been hard at work providing information and promoting remedial action at the state level. A letter was drafted and sent to the governor of each state encouraging the development of state legislation and other ATV safety measures. Also, technical information and other data has been provided to state and local officials with an interest in the ATV situation.

Similarly, our staff has been conducting the extensive, yet essential, engineering research necessary to support the development of a performance standard for ATVs. Specifically, I am advised that

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our engineers have been working on ATV tire/surface characteristics, suspension systems and the development of a transient steering test so that they could better understand the ATV handling characteristics that will be very much a part of such a standard. This work should either speed implementation of the negotiated settlement or put us in a position to proceed with appropriate regulatory action should it fall through. In addition, an updated consumer safety alert on ATVs was issued (in May, 1987) and has been widely distributed. Also, I might mention that, while the industry rejected the Commission's call for a voluntary stop-sale of ATVs intended for use by children under 12 last spring, there are no 1988 model ATVs being made for this age group. Moreover, as part of the tentative settlement, the industry has agreed not to market adult-size ATVs to children under 16, a step clearly in accord with our ATV Task Force's finding that those children are at greater risk of death or injury when they are operating such ATVs.

Given the concern I share for the safety of present and future ATV riders, I can certainly understand the interest in what happened to the repurchase proposal between the end of December, 1986 and the end of December, 1987. Also, the American public has every right to know whether this tentative ATV settlement has the potential for substantially reducing the risk of death and injury and what the Commission is doing, and will be doing, to see that this potential is realized.

Following the Commission's December 12, 1986 decision to seek notice, warning, rider training and a voluntary recall/repurchase of certain ATVs, the CPSC staff tackled the task of implementation. On February 2, 1987, the Department of Justice (DOJ) was asked to represent the CPSC in the matter, prompting the DOJ to quickly assemble an able team of trial attorneys to deal with the case. However, it wasn't long before a complicating factor emerged -- the legal opinion which decided the GM X-car case that had been brought by the Department of Justice for the National Highway Traffic Safety Administration (NHTSA). That legal opinion, which dealt significantly with the issues of product defect and comparative data, forced all involved with the ATV matter to re-evaluate the prospects if the case were to go to court. Likewise, retention by the industry of top flight, Washington D.C. based legal counsel, prompted me to revamp our litigation team and to assign several of our most experienced attorneys to head it up. From there, development of the case proceeded, with DOJ and CPSC attorneys working together to evaluate the facts involved, identify strengths and weaknesses, meet with prospective experts and witnesses and contract with those experts having the most to contribute. In addition, DOJ attorneys carried out extensive legal research, including analysis of arguments and motions the industry might make, in the event the case went to court.

However, before matters reached that stage, the Commission unanimously voted to ask the industry to submit its best offer for a negotiated settlement. That action was taken, I might add, in the wake of unanimous Senate Commerce Committee adoption of legislation addressing the ATV safety issue and calling on the Commission to start negotiations with the industry within 10 days. According to our General Counsel, the industry then responded to our request on December 3rd, met with our attorneys on December 7th and submitted additional material on December 10th. The next day, December 11, 1987, the Department of Justice notified the CPSC of its willingness to file suit in the case, and from that point on, I am told the DOJ took the lead in the settlement discussions that ensued with the ATV industry. Five days later, on December 16, 1987, DOJ attorneys and the CPSC's litigation team briefed the Commission on a draft Preliminary Consent Decree (PCD) that DOJ lawyers had drafted, pointing out the advantages and disadvantages of negotiating a settlement based on that document. All 14 lawyers involved in that briefing (10 from the DOJ and 4 from the CPSC) favored such a settlement. At the conclusion of the briefing, the CPSC unanimously voted to proceed in that direction and, on December 29, 1987, it approved the terms of the two Preliminary Consent Decrees announced on December 30th by a 2-1 vote.

Briefly, those terms are as follows: (1) the immediate stop-sale by manufacturers and distributors of all three-wheeled ATVs and a repurchase program for all 3-wheelers in dealer inventories, (2) adult size ATVs will no longer be marketed to children under 16 and dealers will be actively discouraged from making such sales, (3) hands-on rider training will be provided, free of additional charge, to all new purchasers of ATVs, to members of their immediate families, and to those (and the families of those) who have bought a new ATV within the past year, (4) a substantial public awareness effort will be undertaken by the industry to warn of the dangers associated with riding an ATV, (5) past purchasers will be notified by mail of these hazards, (6) owners manuals will be upgraded to contain the same information. (7) warning labels on the vehicles will be improved, (8) large warning notices (4' x 4' posters) will be posted in dealerships and (9) purchasers will be given a Safety Verification Form to sign. Further, it was agreed that details of these terms would be included in a Final Consent Decree (FCD) to be negotiated and signed by February 13, 1988 -- just two weeks away.

Speaking of a Final Consent Decree, I am informed by our General Counsel that DOJ and CPSC attorneys met with industry representatives on January 8, 1988 and agreed to break into sub-groups for purposes of negotiating the remaining details. These sub-groups have begun their sessions and it is anticipated that a Final Consent Decree will be signed within the 45 day limit for reaching such an agreement. The biggest problem I see right now is, since the terms are not yet complete, it is impossible to estimate with precision the effect they may have on ATV accident-related deaths and injuries. But, generally speaking, because of the Commission's past, present and future efforts, I expect that effect to be substantial. Based on the 20% or so reduction in accidents that has been estimated with motorcycle rider training programs previously, there is good reason to expect ATV rider training will produce a comparable result. Also, based on the CPSC's past experience and/or research, there is every reason to believe consumer education efforts and the other remedies will reduce accidents as well.

As I mentioned earlier, injuries associated with ATVs have dropped 11% in the past year. Our staff analysts tell us this decline appears to be related to a drop in ATV sales generally and to a shift in sales from 3 wheelers to 4 wheelers. If that is the case, as I am inclined to believe, then the question is -- what has provoked those two trends? It seems to me the publicity ATVs have received, either as a direct result of the Commission's activities or as a consequence of the media's interest in ATVs generally, has contributed significantly to both outcomes. Just for the record, since 1984, the Commission and its staff have not only given literally hundreds of media interviews on ATVs, but the CPSC has issued ATV Safety Alerts, on no less than six different occasions, which have been picked up by various newspapers and/or other publications. In addition, publication of the ANPR in the spring of 1985 focused public attention on the subject of ATV safety and generated almost 3,000 public comments reflecting the views of 4,500 consumers. Also, as I noted earlier, the Commission's six public hearings around the country, at which a total of 285 witnesses testified, generated a tremendous press coverage of the dangers associated with ATVs. Several congressional hearings -- this is the third specifically dealing with these off-road vehicles -- have added to the media and public interest, one consequence of which has been no less than 5 network TV shows on ATVs including "20-20" and "60 Minutes."

While it is possible that market saturation or other factors could have contributed to a reversal of the upward trend in ATV sales, logic suggests that all this publicity has played a major role. Likewise, our experience with other products, such as CB antennas and cribs, indicates that consumer information and education efforts can and do have a positive safety effect.

Not to be overlooked is the thought that this settlement, and the publicity surrounding it, should give additional impetus to state and local efforts to develop their own ATV safety laws or regulations. Currently, 38 states have some sort of ATV-related legislation on the books. But even where state laws do exist, they are generally not uniform and usually fail to address the full range of steps the states can take to help reduce deaths and injuries. The fact that the industry chose to make substantial concessions rather than go to court should lend weight to CPSC arguments that the states ought to do more by enacting or, if necessary, expanding laws requiring riders to wear helmets, get training, register their vehicles, abide by strict minimum age requirements and not operate their machines in an unsafe manner. As I said before, it is in precisely these areas over which states have exclusive jurisdiction that a large impact on ATV related deaths and injuries can be made.

Also, the significance of good faith efforts to establish a performance standard for ATVs within four months should not be downplayed. Depending on the specifics, such a standard should increase vehicle stability and decrease the risk of accidents. Likewise, industry's commitments to remove new 3 wheeled ATVs from the market and to discourage sales of adult-size ATVs to children under 16 should have a positive safety benefit. Both are aimed at factors that we know, from our ATV Task Force Report, increase risk.

At this point, it should be noted that all of the remedies detailed in the Preliminary Consent Decree are supported by the major findings of our ATV Task Force. Also, I should point out that, in addition to establishing a detailed administrative framework to support the provision of rider training, which I have long advocated, the ATV industry will advertise the importance of such training and may incorporate, in the Final Consent Decree, additional incentives to get ATV purchasers to take the course. The inclusion of such incentives should alleviate the concerns of those, such as myself, who have wondered whether future training efforts will be any more successful than those sponsored by the industry the past three years.

With respect to the possibility that 3 wheeled ATVs might be marketed in the future, another matter of concern to some, I do not anticipate any existing models coming back on the market for sale in the United States. Under terms of the Preliminary Consent Decree, only after a performance standard acceptable to the CPSC is agreed to would any newly designed 3 wheelers, built to meet that standard, become available for purchase. Also, in this settlement, the industry has committed itself to good faith efforts to reach agreement on such a standard within four months of court approval of the Final Consent Decree, while the Commission retains the right to pursue a mandatory standard if, as seems likely, that time limit is not met.

Assuming a Final Consent Decree is signed, my feeling is that the combination -- and I stress the word combination -- of notice, warning, rider training, phasing out 3 wheeled ATVs, discouraging children from using adult-size ATVs and encouraging states to require such things as helmet usage and ATV registration, will substantially reduce the number of ATV related deaths and injuries. Buttressing that view is an assessment, by our ATV Task Force, that the Commission's efforts, including its participation in an ATV settlement, will result in 22,000 fewer ATV related injuries per year in 1992 then there were in 1987. That's a reduction of 28.9%, compared to a possible increase in deaths and injuries if the Commission were to insist on the recall/repurchase proposal it initially adopted in December 1986. And that estimate does not take into account the effect of state and local ATV safety measures that may be prompted by news of this settlement. Of course, projecting safety benefits doesn't mean they will automatically occur. Monitoring will be necessary to make sure that the industry lives up to any commitments it makes. But there is no reason why such monitoring can't be effectively undertaken, and at far less cost than would be required to take this case to court.

As a matter of fact, the monitoring process is well underway. Phase I consisted of CPSC field staff visiting ATV distributors to determine whether they had ceased sales of 3 wheeled ATVs as of December 30, 1987 and to learn how many 3 wheeled ATVs they had remaining in stock. Also, our investigators sought to ascertain whether the distributors had sent notices to their dealers, within the required 5 day period, advising the latter not to sell 3 wheeled ATVs and informing them that any 3 wheelers left in stock would be repurchased by the distributor. This phase has now been completed and the preliminary results indicate that the marketing and distribution of 3 wheeled ATVs has ceased and that the required notifications were developed and sent to dealers.

Phase II of the monitoring effort, which began January 13th and concluded January 20th, involved staff visits to over 170 dealers around the country to see if they had received notification of the agreement and to find out what they are doing about it. The results indicate that nearly all dealers had received notification and, thanks to the publicity it generated, all those contacted had heard of the tentative settlement and had ceased selling the 3 wheelers. More encouraging yet, as of January 22, 1988, our staff had otherwise learned of only 3 dealers who continued to sell ATVs and now all 3 have ceased doing so. Also, these monitoring efforts, plus those in Phase I, helped our staff ascertain that there are approximately 40,000 3 wheeled ATVs remaining in distributors' and dealers' inventories, thereby underscoring the importance of this ATV settlement. While the manufacturers may not be producing 3 wheelers any more, absent the immediate effectiveness of these arrangements, substantial numbers of new 3 wheelers would still make their way into the hands of ATV enthusiasts.

The third phase of the effort to monitor the Preliminary Consent Decree began on January 25th and is intended to ascertain whether warning signs, ATV safety alerts, copies of the ATV Safety Verification Form and other materials have been delivered to ATV dealers within the 20 days specified in the Preliminary Consent Decree. In this effort, dealers will be checked, with state officials assisting the CPSC field staff with the work. Following its completion, additional monitoring will be undertaken, depending on the specifics of the Final Consent Decree.

To date, the Commission has spent approximately $53,000 on settlement monitoring and estimates that it will take 4.7 FTE's to monitor both the Preliminary and Final Consent Decrees, give or take a little, depending on the specific provisions of the as-yet-incomplete Final Consent Decree. Admittedly, that is a substantial resource commitment for a small agency like the CPSC, but it pales in comparison to what 3 or 4 years of litigation would cost and it could be substantially less than what it would cost to implement the ATV repurchase proposal discussed earlier. Since there are several hundred models of used ATVs in existence, someone -- perhaps a federal court or agency -- would have to determine, in case of disputes, an appropriate refund price for machines that are being returned. Likewise, somebody -- again a federal court or agency -- might have to decide, when there was doubt, whether a 4-wheeled ATV presented for a refund was actually bought for a child under 16. As a December 24, 1987 editorial in the Los Angeles Herald Examiner pointed out, these refunds would "...open the door to fraud and cause companies to pay out perhaps a billion dollars to people who have had no ill effects." Of course, when the returned vehicles were resold, the industry could recoup some of that money, but that gets us back to the problem of the machines generally winding up in the hands of inexperienced or less experienced riders. Which brings up a significant point; even though these inexperienced riders presumably would be trained when they purchased a returned vehicle, and the training course would help, it is not a complete substitute for riding experience.

Before leaving the subject of monitoring costs, permit me to observe that much of the investigative work can be conducted by state and local safety officials with whom the CPSC cooperates. In addition, it may be possible to conduct monitoring activities in conjunction with other scheduled work and, as states develop more of their own legislation, additional cooperative efforts may be possible. In the meantime, the Commission can and will make whatever adjustments are necessary in its 1988 Operating Plan and 1989 Budget to see that our oversight responsibilities are carried out.

If resources were not a consideration, would a negotiated settlement on ATVs along the lines indicated be any less desirable? I think not. As I see it, the safety benefits of such a settlement, as opposed to protracted litigation, are compelling. A mutually satisfactory agreement now will mean no more time will be lost in dealing with the 1985-86 average toll of 20 deaths and 7,000 ATV related injuries per month. Action will be taken to reduce the risk of people dying or becoming paralyzed while riding one of these machines. Moreover, there is no guarantee that voluntary repurchase could be obtained, no matter how much money were available to pursue them in court. Nor is there any assurance that these requirements would do anything to promote ATV safety at some later date. Given the alternatives, I would hope this subcommittee would concur in the action the Commission has taken entering into this agreement. If, by some chance, things don't work out as expected, further steps can and will be taken to protect the riding public from the dangers posed by ATVs.

Mr. **Barnard**. Ms. Dawson.

STATEMENT OF CAROL G. DAWSON, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

Ms. **Dawson**. Thank you, very much, Mr. Chairman. I had planned to read my statement but I will try to do my best to pick out the highlights and shorten it as much as possible.

Mr. **Barnard**. We would be very appreciative.

Ms. **Dawson**. I am pleased to have this opportunity to discuss with the subcommittee the recent steps taken by the Federal Government designed to reduce deaths and injuries associated with the use of ATV's.

Over the past 3½ years, many personal tragedies associated with ATV's have been brought to light and all of them have moved me. Being the mother of four children, all of whom were active and adventurous in their growing up years, I know what it is like to have children put pressure on parents to do things that are inherently risky. I have made my share of visits to the hospital emergency room to treat children who have been injured accidentally. But I was fortunate; none of my children have been injured or killed by an ATV. I am saying this because I am sympathetic and supportive of those parents who have had this experience, this tragic experience, because I know it could have happened to me. It could have happened to anyone.

I don't believe they should blame themselves. These tragedies are things that could have happened to the average person. In traveling throughout the country attending public hearings which the CPSC conducted on this issue, I heard over and over again that parents were simply not aware of the danger these vehicles posed. Sometimes, even when every precaution was taken and an experienced adult was a rider, there were still fatal accidents.

The fact is that all during this period, when the Commission was involved in addressing the issue, the manufacturers took no reasonable action to deal with the situation. I find that incredible.

So the relief package that the Commission sought in the section 12 complaint, to me, was only common sense. The ATV industry should have done all those things a long time ago. The recommended voluntary refund provision reflected nothing more than good business. If a customer is dissatisfied with a product, responsible manufacturers provide a money-back guarantee or at least agree to some credit or some like compensation.

While the refund was not achieved in the current consent decree, the safety measures the Government has finally obtained through the preliminary consent decree do go a long ways toward fulfilling most of the objectives of the complaint without the attendant delays which accompany court action. In some ways the decrees exceed the original remedies we sought.

For the record, I want to say I haven't changed my position on the refund provision. I still believe that the refund provision is not only fair, but would have sent a strong public safety message. We must remember that the Department of Justice has filed a complaint asking the court for all the relief sought by the Commission majority, including an order for defendants to offer a reasonable refund to those who bought either a three-wheel ATV or an adult-size four-wheel ATV for use by children under 16. The preliminary consent decrees, while they do not include the voluntary refund, represent a serious effort by the Government to achieve as much as possible without costly and lengthy litigation. It should be underscored that if negotiations break down before a final consent decree is achieved, the Department of Justice has pledged that it is ready to pursue this case vigorously and to seek a court order requiring all the relief—including a voluntary refund provision. Thus, I believe my recent decision is consistent with my vote of December 12, 1986.

As you know, the preliminary consent decrees were worked out by our staff attorneys and Department of Justice attorneys with the ATV industry. As a Commissioner, neither I nor my staff took any part in the discussions with the ATV industry. I have relied completely on the professionalism and competence not only of our attorneys but also of the Department of Justice attorneys in this matter. They assured me that they aggressively sought the best agreement possible.

Of course the actions that have been undertaken by the ATV industry which have already been enumerated by Chairman Scanlon in his statement are only the first steps in addressing the hazards addressed by ATV's, a bare minimum. Should the final consent decrees be signed, a host of other actions will be undertaken by the ATV industry with regard to notice, warning labels and training. Of course, consistent with my decisionmaking responsibilities, I am reserving judgment on the final agreement until I am satisfied that the industry will undertake an adequate and comprehensive plan of action.

Thus, it was on the strong recommendation of the Department of Justice and that of our own staff attorneys I agreed to this course of action. In good conscience, I could not reject an opportunity for immediate relief. A little over a year ago when the Commission voted to initiate this enforcement action, there were approximately 650 known deaths associated with ATV's. Now we know that there are over 900 ATV-associated deaths. It would have been irresponsible, in my view, for the CPSC to opt for several more years of litigation to get 100 percent of what we sought while deaths and injuries continued to mount.

My decision to seek immediate relief will not foreclose individuals from pursuing other appropriate remedies. The Consumer Product Safety Act is not the only law intended to protect consumers. There are other Federal laws, not administered by the CPSC, and a variety of other State and local laws that protect the consumer against fraud, breach of warranty, and deceptive marketing.

In that regard, I was very interested to read in the Washington Post on January 11, 1988, that a group has instituted a class action lawsuit against the ATV industry seeking refunds for ATV purchasers. It is my understanding that their claims are being brought under laws protecting the consumer from unfair commercial practices. This development reinforces my belief that there are many approaches to addressing the complexities of the ATV safety problem. CPSC is a tiny agency, getting smaller with each congressional appropriation, and it administers laws which at times fall short in covering unique and unforeseen problems in product safety.

As this subcommittee observed in its report of October 2, 1987, the Commission was to be commended and supported for its decision of December 12, 1986, to bring an enforcement action against the ATV industry. Your report noted that further implementation of the enforcement action "should result in reducing the continuing toll of deaths and injuries from ATV's." The preliminary consent decrees worked out by the Government exceed the remedies authorized by the December 12 decision. Under their terms, the ATV industry will stop the sale of all three-wheeled ATV's—a remedy which goes beyond those authorized in our December 12, 1986, decision.

Certainly, I would have preferred an agreement in which the ATV industry had conceded everything including the refund provision. Frankly, in light of the class action lawsuit now pending, they may regret not having done so. But because of our efforts, and because of your concern and this committee's oversight activities, the work of our authorizing committees in the House and Senate and the particular concern of Senators D'Amato, Gore and McCain, and Congressmen Florio, Eckart and Barton, the ATV industry has finally agreed to undertake several significant steps toward greater ATV safety. I hope this process will result in reducing ATV hazards. Parents of children attracted to these vehicles, and adult enthusiasts of the sport, deserve the most effective solutions their Government can achieve.

Mr. **Barnard**. Thank you.

[The prepared statement of Ms. Dawson follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

Statement of

Vice Chairman Carol G. Dawson

Before the

Commerce, Consumer, and Monetary Affairs

Subcommittee

of the

Committee on Government Operations

U.S. House of Representatives

January 28, 1988

Statement of
Vice Chairman Carol G. Dawson
January 28, 1988

Thank you, Mr. Chairman. I am pleased to have this opportunity to discuss with the subcommittee recent steps taken by the federal government that are designed to reduce deaths and injuries associated with the use of all-terrain vehicles (ATVs).

But before I address the most recent steps, allow me to review briefly my involvement with this issue. I have been a member of the Commission since July 1984, and the ATV matter was first addressed by us in October of that year. I was involved in proposing the seven-point plan adopted by the Commission in April 1985, which eventually led to the Task Force Report and the Commission's December 12 and December 18, 1986, decisions.

Over these past three and a half years, many personal tragedies associated with ATV use have been brought to light and all of them have deeply moved me. Being the mother of four children, who were all active and adventurous during their growing-up years, I am familiar with the ways in which children succeed in obtaining parental approval, albeit reluctant, to undertake risky activities. Although, like all parents, I have made my share of trips to the hospital emergency room for treatment of a child for some accidental injury, I was fortunate none of mine was killed or permanently injured by an ATV. But I know very well that it could have happened. That is why I am sympathetic with and supportive of those parents whose children have been killed or permanently injured by these vehicles. I don't believe they should assume blame. The tragedies that happened to them could have happened to any of us.

In my travels throughout the U.S. attending public hearings on this issue, I heard over and over again that parents were simply not aware of the dangers. And sometimes, even when every precaution was taken and an experienced adult was the rider, tragic fatal accidents occurred.

The fact that during all this time, in spite of the Commission's efforts, the manufacturers took no reasonable action to deal with the situation is just incredible.

Plainly, the relief package sought by the Commission in the section 12 complaint was only common sense--the ATV industry should have done all these things long ago. The recommended voluntary refund provision reflected nothing more than good business. If a customer is dissatisfied with a product, responsible manufacturers provide a money-back guarantee, or at least agree to some credit or like compensation.

While the refund was not achieved, the safety measures the government has finally obtained through the preliminary consent decrees go a long way toward fulfilling most of the objectives of the complaint, without the attendant delays which accompany court action. In some ways the decrees exceed the original remedies we sought.

Mr. Chairman, you have expressed several concerns regarding the preliminary consent decrees. One of those concerns centers on my recent decision to support the agreement. You have posed it as a question--why did I change my position on the voluntary refund provision by voting to accept the preliminary consent decrees?

For the record, I have not changed my position on the refund provision. I still believe that the refund provision is not only fair, but would have sent a strong public safety message. We must remember that the Department of Justice has filed a complaint asking the court for all the relief sought by the Commission majority, including an order for defendants to offer a reasonable refund to those who bought either a three-wheel ATV or an adult-size four-wheel ATV for use by children under 16. The preliminary consent decrees, while they do not include the voluntary refund, represent a serious effort by the government to achieve as much as possible without costly and lengthy litigation. It should be underscored that if negotiations break down before a final consent decree is achieved, the Department of Justice has pledged that it is ready to pursue this case vigorously and to seek a court order requiring all the relief--including a voluntary refund provision. Thus, I believe my recent decision is consistent with my vote of December 12, 1986.

As you know, the preliminary consent decrees were worked out by our staff attorneys and Department of Justice attorneys with the ATV industry. As a Commissioner, neither I nor my staff took any part in the discussions with the ATV industry. I have relied completely on the professionalism and competence not only of our attorneys but also of the Department of Justice attorneys in this matter. They assured me that they aggressively sought the best agreement possible.

I was first advised of the consent decree strategy in mid-December, 1987. At a closed meeting on December 16, the Commission was briefed on the Department of Justice's plan to file the section 12 complaint, concurrently with the two preliminary consent decrees that had been drafted by the Department of Justice. The preliminary consent decrees require the ATV industry to undertake several immediate steps which begin to address the ATV problem. Several important safety measures have been initiated while the federal government retains the right to proceed in litigation should the discussions break down.

In the preliminary consent decrees, defendants have agreed immediately to stop sale of all three-wheeled ATVs, to repurchase three-wheelers now in dealer inventory, to send safety warnings to all past purchasers of ATVs, to stop marketing adult-sized ATVs to children under 16 and to place posters in ATV dealerships warning customers of ATV dangers. Of course, these actions are only the first steps in addressing the hazards posed by ATVs--the bare minimum. Should the final consent decrees be signed, a host of other actions will be undertaken by the ATV industry with regard to notice, warning labels and training. Of course, consistent with my decision-making responsibilities, I am reserving judgment on the final agreement until I am satisfied that the industry will undertake an adequate and comprehensive plan of action.

Mr. Chairman, while the absence of the voluntary refund provision is a disappointment, I must acknowledge that typically both parties must be flexible in negotiations. As our attorneys noted, to persuade the ATV industry to concede its right to a day in court--a procedure which would have delayed critical safety measures for far too long--something had to give. I can assure you, Mr. Chairman, that I never would have conceded any measure essential to consumer safety. Importantly, the Commission retains the right to seek a refund remedy under section 15 of the CPSA should circumstances warrant. Therefore, on the strong recommendation of the Department of Justice and that of our own staff attorneys, I agreed to this course of action. In good conscience, I could not reject this opportunity for immediate relief. A little over a year ago when the Commission voted to initiate this enforcement action, there were approximately 650 known deaths associated with ATVs. Now we know that there are over 900 ATV-associated deaths. It would have been irresponsible, in my view, for the CPSC to opt for several more years of litigation to get 100 percent of what we sought while deaths and injuries continued to mount.

My decision to seek immediate relief will not foreclose individuals from pursuing other appropriate remedies. The Consumer Product Safety Act is not the only law intended to protect consumers. There are other federal laws, not administered by the CPSC, and a variety of other state and local laws that protect the consumer against fraud, breach of warranty and deceptive marketing.

In that regard, I was very interested to read in the Washington Post on January 11, 1988, that a group has instituted a class action lawsuit against the ATV industry seeking refunds for ATV purchasers. It is my understanding that their claims are being brought under laws protecting the consumer from unfair commercial practices. This development reinforces my belief that there are many approaches to addressing the complexities of the ATV safety problem. CPSC is a tiny agency, getting smaller with each Congressional appropriation, and it administers laws which at times fall short in covering unique and unforeseen problems in product safety.

ATV safety should also be addressed by states adopting laws requiring licenses, appropriate riding gear, or minimum driver ages. Product liability laws, consumer protection laws, marketplace activities and greater public awareness of the risks will combine for an overall reduction of the dangers posed by ATVs. The Commission will continue to do all that it can with the authority and resources granted it by Congress. But there are some regulatory remedies not well-suited to federal action. Such actions by the states and by individuals are being encouraged by the Commission.

As this subcommittee observed in its report of October 2, 1987, the Commission was to be commended and supported for its decision of December 12, 1986, to bring an enforcement action against the ATV industry. Your report noted that further implementation of the enforcement action "should result in reducing the continuing toll of deaths and injuries from ATVs." The preliminary consent decrees worked out by the government exceed the remedies authorized by the December 12 decision. Under their terms, the ATV industry will stop the sale of all three-wheeled ATVs--a remedy which goes beyond those authorized in our December 12, 1986 decision.

Certainly, I would have preferred an agreement in which the ATV industry had conceded everything including the refund provision. Frankly, in light of the class action lawsuit now pending, they may regret not having done so. But because of our efforts, and because of your concern and this committee's oversight activities, the work of our authorizing committees in the House and Senate and the particular concern of Senators D'Amato, Gore and McCain, and Congressmen Florio, Eckart and Barton, the ATV industry has finally agreed to undertake several significant steps toward greater ATV safety. I hope this process will result in reducing ATV hazards. Parents of children attracted to these vehicles, and adult enthusiasts of the sport, deserve the most effective solutions their government can achieve.

(Attached is my statment of December 30, 1987 on the preliminary consent decrees)

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

December 30, 1987

OPINION OF

COMMISSIONER CAROL G. DAWSON

ON PRELIMINARY CONSENT DECREES WITH THE ATV INDUSTRY

My decision to support these preliminary consent decrees is based on my belief that immediate action to protect consumers from further unnecessary death and injury associated with all-terrain vehicles is in the public interest.

I do so with regret that a voluntary repurchase provision has not been attained. However, it should be underscored that the Commission, in endorsing these decrees, has reserved the right to pursue additional relief, such as repurchase or recall, if it finds the current remedies are not effective in reducing deaths and injuries. Further, the agreements do not deny the consumer's right to seek individual redress through the courts.

This is a case in which I must carefully weigh the benefits to consumers. The choice was between a timely, effective, and comprehensive remedy or a possibly lengthy and expensive litigation, the final results of which might not achieve as much as could be achieved with these preliminary agreements.

Uppermost in my mind is the need for immediate action. The Commission first undertook an examination of the ATV issue in 1984. It is now nearly the beginning of 1988, and until today, meaningful action still had not been taken. Starting today, at least some relief will be in sight.

The Commission will be watching closely as its negotiating team fleshes out the preliminary agreements to make certain that the public interest is preserved. It must be emphasized that if, for any reason, a satisfactory final consent decree is not achieved, the Justice Department will immediately pursue the lawsuit.

In summary, my decision reflects a difficult choice. I opted for pursuing a consent decree which will achieve as much as possible as soon as possible. I strongly believe that these preliminary agreements, if finalized, will be in the public interest; whereas, it is no one's interest to pursue protracted litigation with an uncertain outcome.

Mr. **Barnard**. Ms. Graham.

STATEMENT OF ANNE GRAHAM, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

Ms. **Graham**. I appear here today as the only Commissioner who voted against the preliminary consent decree. I did so because this decree does not provide the remedies necessary to protect millions of Americans, many of whom are children, from the imminent hazards associated with all-terrain vehicles [ATV's]. I believe this is a classic case of locking the barn door after the horse is gone.

Those who claim this decree represents a victory for the Commission are not looking at the facts. The decree may appear on the surface to have some substance, but upon close examination falls far short of protecting the consumer from the risk. I am confident that once the facts are explored, the truth will be known: The victory belongs to the ATV industry, and not to the consumers of this country.

Those who claim victory for the consumer cite the stop sale of three-wheeled ATV's. Let's look at the facts. First, the stop sale applies to only new three-wheeled ATV's. Before this decree was signed, the manufacturers had, for all practical purposes, already stopped production of three-wheeled ATV's. Thus, I am concerned about consumers who continue to ride the almost 1.5 million three-wheeled ATV's that are in use now. Those consumers have not been adequately warned, trained or afforded reasonable recourse. Children account for almost half the deaths and injuries involved with ATV's. I am concerned that this decree does not adequately address protection of the children.

The Department of Justice, on behalf of the Consumer Product Safety Commission, has filed in the U.S. District Court, a complaint which seeks the relief necessary to adequately reduce the imminent and unreasonable hazards posed by ATV's. In that complaint, the U.S. Government states and I quote:

> The precautions necessary to abate the grave hazard posed by ATV's—such as truthful, non-misleading advertising; a public awareness campaign, free hands-on training, careful oversight of point-of-purchase representations; and a limited refund—are relatively inexpensive, particularly when compared to the high cost in human suffering caused by ATV's.

This complaint, unlike the consent decree, addresses unequivocally the remedies necessary to protect the American public. Every 3 days, two people are killed on ATV's, and an estimated 650 people are treated in hospital emergency rooms. Since 1982, there have been 900 reported deaths and an estimated 350,000 injuries requiring treatment in hospital emergency rooms.

In 1986 alone, the Commission estimates the costs of ATV related deaths and injuries to be about $1.6 billion. These are not just statistics, these are human beings. Almost half are children, the children of parents who were misled by the manufacturers. Yesterday I received a petition from one parent, a responsible parent, who lost her son to a three-wheeled ATV. Anne Settle gathered 900 signatures in 1 week, people from small towns in Texas urging the Commission to recall three-wheeled ATV's. I request this petition be made part of the record.

Mr. **Barnard**. Without objection, so ordered.

Ms. GRAHAM. Mr. Chairman, I cannot support a consent decree that does not achieve the relief necessary to protect the American consumer—particularly the children. If this settlement cannot be significantly improved, I believe the Commission should go forward in court or Congress should legislate a solution to this serious public safety problem.

[The prepared statement of Ms. Graham follows:]

U S CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D C 20207

Opening Statement

Anne Graham, Commissioner

Subcommittee on Commerce, Consumer and Monetary Affairs

January 28, 1988

I appear here today as the only Commissioner who voted against the preliminary consent decree. I did so because this decree does not provide the remedies necessary to protect millions of Americans, many of whom are children, from the imminent hazards associated with All Terrain Vehicles (ATVs).

Those who claim this decree represents a victory for the Commission are not looking at the facts. The decree may appear on the surface to have some substance, but upon close examination falls far short of protecting the consumer from the risk. I am confident that once the facts are explored, the truth will be known: the victory belongs to the ATV industry, and not to the consumers of this country.

Those who claim victory for the consumer cite the stop sale of three-wheeled ATVs. Let's look at the facts. First, the stop sale applies to only new three-wheeled ATVs. Before this decree was signed, the manufacturers had, for all practical purposes, already stopped production of three-wheeled ATVs. Thus, I am concerned about consumers who continue to ride the almost 1.5 million three-wheeled ATV's that are in use now. Those consumers have not been adequately warned, trained or afforded reasonable recourse. The Commission did not even attempt to negotiate a settlement that would allow these consumers to return their ATVs for a reasonable refund. To the contrary, the Commission actually rejected the offer of one manufacturer to provide a rebate. Whose interests are being served by such an apparently irrational action? Certainly not the consumers'.

Children account for almost half the deaths and injuries involved with ATVs. How many deaths and injuries to children will be prevented by a decree which does not provide for a recall of adult-sized ATVs purchased for the use of children under 16? How many deaths and injuries will be prevented when the decree does nothing to restrict the use of child-sized ATVs by children under 12, and specifically leaves open for further negotiation the question of whether children aged 14 and older can continue to ride adult-sized ATVs? I have always believed that this Commission has a particular responsibility to protect children. Yet this decree does not even seek to recall adult-sized ATVs purchased for children under 16 by unsuspecting parents. Quite frankly, I find this indefensible.

The safety verification form is another matter of concern. I support every measure that will ensure that consumers are fully warned of the hazards presented by this extremely dangerous machine. Nevertheless, I question whether this is the real intent behind the verification requirement and whether this form will, in fact, have that effect. The decree does not prohibit the manufacturers from introducing the verification form in liability actions as evidence to support their contentions that the consumer misused the ATV or assumed the risk. Consequently, the form could be used to limit or defeat an injured individual's relief under state law. This could have been avoided had the decree simply stated that the manufacturers could not use the verification form as evidence in a product liability suit. I am deeply concerned that the Consumer Product Safety Commission is affirmatively requiring, as a condition of this settlement, a verification that could result in a serious limitation of consumers' rights. Moreover, I believe such an action is without precedent in the federal health and safety area.

My reservations about what the decree contains are no more serious than my reservations about what the decree does not contain. This decree is a document that omits key safety protections and reflects little more than what the industry should have agreed to three years ago.

For three years, we have held meetings to discuss the need for more effective warning labels. The result: no agreement. For three years, we have been discussing the age guidelines with industry. The result: no agreement. For three years, we have been asking industry to significantly augment their training program. The result: no agreement.

The Japanese manufacturers, unlike most industries with which the Commission works, have not demonstrated any good faith efforts to correct the dangers associated with their product. In fact, I believe they have not been honest with the American public. There is no basis to believe that this industry will make a good faith effort now after three years of failing to deal forthrightly with the Commission.

The Department of Justice, on behalf of the Consumer Product Safety Commission, has filed in the United States District Court, a complaint which seeks the relief necessary to adequately reduce the imminent and unreasonable hazards posed by ATVs. In that complaint, the United States Government states and I quote:

> "The precautions necessary to abate the grave hazard posed by ATVs -- such as truthful, non-misleading advertising; a public awareness campaign, free hands-on training, careful oversight of point-of-purchase representations; and a limited refund -- are relatively inexpensive, particularly when compared to the high cost in human suffering caused by ATVs."

This complaint, unlike the consent decree, addresses unequivocally the remedies necessary to protect the American public. Every three days, two people are killed on ATVs, and an estimated 650 people are treated in hospital emergency rooms. Since 1982, there have been 900 reported deaths and an estimated 350,000 injuries requiring treatment in hospital emergency rooms.

In 1986 alone, the Commission estimates the costs of ATV related deaths and injuries to be about $1.6 billion.

Mr. Chairman, I cannot support a consent decree that does not achieve the relief necessary to protect the American consumer -- particularly the children. If this settlement cannot be significantly improved, I believe the Commission should go forward in court or Congress should legislate a solution to this serious public safety problem.

Thank you.

Mr. **Barnard**. Thank you, very much.

As you have heard from the testimony today, especially from various Members of Congress, there is considerable congressional concern about this settlement, to the degree, as you have already noted in your testimony even some of the Members who have testified today are considering legislation to do what the Consumer Product Safety Commission has not done. Which comes about because of the inadequacies of the settlement. There are a lot of questions that I would like to ask, that unfortunately time is not going to permit me to do today, and so I will be asking each one of you some questions which I would hope that you could expedite in view of the fact that this settlement becomes—unless it is overruled—it becomes agreed upon by February 15.

We may have to, Mr. Craig, maybe have another half day of hearings if we don't get through today at a reasonable time. A reasonable time may be within another 1½ hours.

I am discouraged we haven't left enough time for your testimony.

I guess the thing I would like to dwell on first, rather than the adequacy of the settlement, which I think it is a matter of some questions, let me ask this, Mr. Scanlon, what was the reason that you felt that the Commission could not press for some type of refund?

Mr. **Scanlon**. I didn't think it was winnable in court.

Mr. **Barnard**. A voluntary refund would not be winnable in court?

Mr. **Scanlon**. I didn't think so, and I don't think the record of the ATV Task Force that I referenced earlier, which was developed by 18 careerists with various disciplines within the Commission, supported that refund. My biggest concern, Mr. Chairman, if I may, was that, with the voluntary refund, the likely candidates for repurchasing the ATV's would have been untrained riders. As I referenced earlier, there is a 13 to 1 ratio, that is you have a 13 times greater chance of being injured during the first 30 days of riding an ATV. This was my main concern.

Mr. **Barnard**. I think that was a concern, but what about those who continue to ride them? You mean they don't get hurt at all?

Mr. **Scanlon**. They have a much less chance of getting hurt.

Mr. **Barnard**. But the risk is still there.

Mr. **Scanlon**. A risk is still there, correct. But reduced significantly.

Mr. **Barnard**. Well, now, Commissioner Dawson, at some point in time you—supported a refund, right?

Ms. **Dawson**. Yes, sir.

Mr. **Barnard**. OK. From the time you supported the refund to the time you were asked to vote on December 16, how much involvement did you have in the negotiations and in the settlement?

Ms. **Dawson**. As I said in my statement, I was not involved whatsoever in the negotiations. My only involvement with the settlement was when the attorneys came before us, as a Commission, and presented this agreement and asked us if——

Mr. **Barnard**. What date was that?

Ms. **Dawson**. December 16.

Mr. **Barnard**. December 16.

Ms. **Dawson**. And again on the 24th. Excuse me, I am sorry, the 29th. The 16th would have been the date on which the attorneys told us that this was the strategy——

Mr. **Barnard**. Did you think you adequately prepared for that meeting on December 16?

Ms. **Dawson**. Well, You have to recall that I have been involved in this entire issue for a good long time. I think I am fairly up to speed on the issues regarding ATV safety.

I had not seen the actual document until the day that we did decide on it. However, it was fairly clear; we had a 4-hour briefing——

Mr. **Barnard**. Did you have an opportunity to question them on the refund?

Ms. **Dawson**. Yes.

Mr. **Barnard**. And you were satisfied the refund would be less best than to ask for one?

Ms. **Dawson**. I don't want to reveal too much of what went on in that closed meeting, Mr. Chairman, but I will say I was told, as I say in my statement, this was the best agreement that these attorneys felt they could come up with, and that was part of my decision, yes.

Mr. **Barnard**. You didn't think it was unusual that you, even though there was a 4-hour meeting, you didn't find it unusual that you were not counseled or consulted about the settlement or even participated in the negotiations?

Ms. **Dawson**. The procedure that was followed right from the beginning in our association with the Department of Justice was that they would be working through our general counsel, not directly with the Commissioners. In a way——

Mr. **Barnard**. Where does the responsibility lie?

Ms. **Dawson**. We have to make the decision.

Mr. **Barnard**. That is right. But did you feel that you had adequate time to study and make an opinion of the settlement?

Ms. **Graham**. I think we all probably could have used additional time, Mr. Chairman, but we did spend a long session with the Department of Justice lawyers going through a lot of the paperwork on this.

Mr. **Barnard**. All right. So, in other words, there was a meeting on December 16, at which time this decision was made?

Ms. **Dawson**. I would like to correct the record so I don't mislead. The meeting on December 16 was simply to get the Commission's approval of this as a strategy. It wasn't until the 29th that the Commission actually voted to approve the preliminary consent decree. And I have to state also for the record that there is still a final consent decree to be negotiated, so that we are still in the negotiating process.

Mr. **Barnard**. What is the significance of the meeting on December 15, other than——

Ms. **Dawson**. The 17th?

Mr. **Barnard**. What is the significance of the February 15 date?

Ms. **Dawson**. That is the end of the 45-day period that is allowed between the time of the signing of the preliminary consent decree and the time of the final consent decree.

Ms. **Graham**. When we will vote again.

Ms. **Dawson**. There are details to be worked out in the final consent decree that do not appear in the preliminary decree.

Mr. **Barnard**. Mr. Scanlon, are you and Ms. Dawson committed now to vote for the consent decree?

Mr. **Scanlon**. I am waiting to see what it will contain, Mr. Chairman. We don't have that information yet.

Mr. **Barnard**. Don't you pretty well know what it is going to contain?

Mr. **Scanlon**. Not necessarily. Those discussions are going on between the industry attorneys and the Government.

Mr. **Barnard**. Well, then, what significance is a settlement that has been so advertised? What is the significance of that?

Mr. **Scanlon**. I am not sure of your question.

Mr. **Barnard**. The question is—in other words, if the final decision hasn't been made, is this just out for comment? Is that the purpose of it?

Mr. **Scanlon**. No. There are hard negotiations going on today.

Mr. **Barnard**. With whom?

Mr. **Scanlon**. Between the Government and industry. This will not be made final until a Commission vote in mid-February.

Ms. **Dawson**. Mr. Chairman, if I could, I would like to add to that. There were certain actions which the industry pledged to undertake under the preliminary consent decree, such as notifying the dealers about the stop sale and notifying past purchasers and so forth. All those activities are taking place now, and, in fact, the Commission staff is actively monitoring the compliance with those activities. So whether or not we ever sign a final consent decree, those activities will have occurred.

The other arrangements that are being worked out deal with things such as the size of the media campaign and those sort of things which don't appear in the document that we have got now.

Mr. **Barnard**. Well, let me get back to the substance of the hearing just briefly. That is, if the logic of this settlement would require some form of refund, you are providing notices and warnings, but no alternative for people to act on any other decision. What are the people who own these—what are they supposed to do? If you have one of these three-wheelers and it is inherently dangerous, the only alternative left, it seems to me, you have let the consumer have the opportunity to scrap it or to sell it in the used three-wheeler market. I don't follow the logic of not asking for a refund.

Ms. **Dawson**. Mr. Chairman, I still support the concept of a refund, however it is achieved—whether it is achieved legislatively or through lawsuits or whatever. But if I were asked what I would do if I were the owner of, say, a three-wheel ATV, and I no longer wanted to use it because I was informed now of the hazards, which I wasn't aware of before, I would take it back to the dealer who sold it to me and try to get my money back.

Mr. **Barnard**. But he wouldn't be required to do it.

Ms. **Dawson**. Wouldn't be required to, no; but I think if enough people did that, I don't think they could ignore it for long.

Mr. **Barnard**. Well, that is a question, and what was your problem in not making them do it?

Ms. **Dawson**. The best way to describe my problem was that I was so frustrated over the lack of any meaningful action on this issue that I thought that the best thing to do was to take this settlement, which our attorneys have assured us was the best they could do; they assured us they did vigorously try to obtain the best agreement for us, because otherwise we would have no consumer protection at all.

Mr. **Barnard**. Isn't it true, though, that really the manufacturers really wore you all out?

Mr. **Scanlon**. No.

Mr. **Barnard**. They have made promises and promises and promises, and yet they had not really fulfilled those promises.

Ms. Graham, how do you respond to that?

Ms. **Graham**. Mr. Chairman, I can't represent the other two Commissioners. I felt that it was very important to continue to pursue this by filing the complaint and continuing to negotiate. I was concerned about the fact that the voluntary refunds were not a part of the package, and I was concerned about other aspects of the package.

I do think that for 3 years we have been working with this industry, and we have been trying to get results on fundamental things like the wording on labeling, a hands-on training program, and after 3 years of working with them, we have no agreement. So my personal view is, that this industry does not deal generally in good faith.

Having said that, I want to keep an open mind in terms of trying to achieve as much as we can to protect the consumers on ATV's.

Mr. **Barnard**. I want you to respond to that, Mr. Scanlon.

Mr. **Scanlon**. I think one thing not mentioned by you earlier, Mr. Chairman, is training. That is part of this preliminary consent decree. All new purchasers will receive training, as will members of their families. That will go back for 12 months.

Mr. **Barnard**. That is a prerequisite for the purchase of one?

Mr. **Scanlon**. It is an offering made by the manufacturer.

Mr. **Barnard**. No, no. It is not a requirement.

Mr. **Scanlon**. Training at no charge.

Mr. **Barnard**. It is not a requirement though.

Mr. **Scanlon**. Not a requirement, no.

Mr. **Barnard**. So that is just an offering?

Mr. **Scanlon**. It is an offering that will effect product safety.

Mr. **Barnard**. And what kind of oversight will you maintain over that?

Mr. **Scanlon**. Well, we are maintaining oversight right now.

Mr. **Barnard**. How?

Mr. **Scanlon**. Well, right now we have a program at the Commission aimed at making sure that the dealers are not selling three-wheelers.

Mr. **Barnard**. That is not the question. The question I am asking is how can you oversee whether or not the training required in the settlement will be accomplished?

Mr. **Scanlon**. We will send compliance officers out into the field to see, in fact, that the dealers are offering training to purchasers at the time of purchase. We will see that they are doing that.

Mr. **Barnard**. Well, won't that take a tremendous staff? With 4,500 dealers in the country, you are going to put a staff person in every State of the Union?

Mr. **Scanlon**. We think it is important enough to demand, in this preliminary consent decree, so we will have to follow up to see if it is going to be done.

Mr. **Barnard**. If you ask for that, certainly you have some idea in mind as to how your operations would require that. How do you perceive that?

Mr. **Scanlon**. Well, once we have a final consent decree——

Mr. **Barnard**. Every time——

Mr. **Scanlon**. If I can finish.

Mr. **Barnard**. Sure.

Mr. **Scanlon**. We will have an enforcement program which will be adopted by the full Commission. We will check dealerships to see that training in fact is being offered.

We will check dealerships to see that the 4-by-4 posters are in fact posted.

We will see that no three-wheelers are in fact being sold.

Everything that is in the preliminary consent decree will be checked.

Mr. **Barnard**. How?

Mr. **Scanlon**. Well, they will be enforced by a Federal judge if there are violations.

Mr. **Barnard**. How are you going to oversee it?

Mr. **Scanlon**. With our enforcement staff in our various field offices.

Mr. **Barnard**. How many do you have?

Mr. **Scanlon**. There are about 150, Mr. Chairman.

Mr. **Barnard**. One hundred fifty field offices?

Mr. **Scanlon**. About 28 field offices with about 150 people in the field.

Mr. **Barnard**. And how is that distributed around——

Mr. **Scanlon**. Also, we have State designees in each of the 50 States that are assisting us with monitoring the preliminary consent decree.

Mr. **Barnard**. Lots of luck.

Mr. Craig.

Mr. **Craig**. Mr. Chairman, I have been listening with interest to the exchange between you and the Chairman in the ability to monitor and ultimately control and enforce a safety training program.

The same question comes to mind, if we were to follow an absolute ban, refund kind of thing, if you ban the vehicle from the market, what do we do then? Do we send Federal marshals into the field to confiscate all of those vehicles that were owned that people chose not to voluntarily give up?

I guess my question is, yes, that is what you do. You have got a Federal judge enforcing a violator and anyone of those 1.5 million owners out there would ultimately be violating a Federal decision. So—not trying to take sides—my position is well known and I guess my frustration is one of yours. When you deal in something of this magnitude, in an attempt to arrive at what is a reasonable approach as quickly as you can, to get some safety in place, then obviously the decision is tough.

You know—go ahead, Mr. Chairman.

Mr. **Barnard**. Let me tell you where I am coming from so we can discuss that.

Mr. **Craig.** I think I know, but go ahead.

Mr. **Barnard.** What I am talking about, and I have discussed this with several of the Commissioners, I am talking about a voluntary refund. To me that would satisfy some of the anxieties that you have.

We are not asking for a court to go out and confiscate all three-wheel ATV's. The suggestion I have made is, in addition to all of this other settlement, why couldn't there very logically be that parents with three-wheel ATV's who have now discovered that there are dangers, who no longer want their kids to be riding them, why couldn't they be offered a voluntary refund?

Mr. **Craig.** My logic goes something like this. Voluntary refund—well, first of all, if you have the option in the marketplace to sell and voluntarily refund, those are the two options, and you have already decided in your mind that the vehicle you purchased is an unsafe vehicle, if the voluntary refund is good, it will immediately sweep those from the market. If there isn't a voluntary refund in place, somebody is arguing that it won't.

What I suggest at this point is somebody makes a decision not on safety but on economics. If you have made the decision of safety, you are going to get rid of that vehicle right now, today. You are going to lead it in the back of your truck and take it to a used lot or back to your dealer and say, I want my money. And if he says I can't give it to you, you may say put it on your lot and sell it for me by consignment, or put an ad in the newspapers.

The bottom line is, the logic I am hearing, is that if a recall works, safety doesn't work. It is all based on economics, and I know that is false.

Mr. **Barnard.** But if it is a decision, like your suggestion, back in the hands of the parents?

Mr. **Craig.** The decision is there now.

Mr. **Barnard.** Oh no.

Mr. **Craig.** Oh, it is too. There is a very active marketplace buying and selling used ATV's. If you are a parent and I am a parent, and our children have been hurt, we want to get rid of the damn thing. We are going to get rid of it. We might junk it out and not take a dime for it.

Mr. **Barnard.** If you know your colleague, Mr. Bustamante, he has done just that.

Mr. **Craig.** Why didn't he sell it if he wanted to get his money back? That is his choice.

I guess the conclusion I am making if a refund is the only avenue to safety, then I question the intention of the people involved, because if safety is the issue and not refund, they have already gotten rid of the vehicle. And they probably didn't sell it for what it was worth new, but they sold it for what the marketplace was calling for.

Enough of our own discussion. I have got a couple of questions, Mr. Chairman.

Ms. Dawson, there have been some very interesting dynamics in this issue for a long period of time. I guess I can appreciate your frustration and concern as it relates to getting somewhere. A lot of politics are involved in this right now, politics from the standpoint of pressure—maybe not the kind of politics that one of the former witnesses talked about—but there have been hearings, lots of hearings, and lots of publicity, and there have been threats of legislation, as this whole issue moved along. Certainly legislation is an option. No question about it. That is not your decision to make. That is our decision to make.

In July the majority of this committee recommended that if the Consumer Product Safety Commission did not act immediately—I believe were the words—the manufacturers should at least cease production of three-wheelers, give notice to previous owners, develop a voluntary standard incorporating minimum age requirement, make training courses available to all owners, provide strong warning labels for vehicles and stress the need for safety in all adversities.

As I understand it, the consent decree that you have discussed with us basically handles all of that. Is that not correct?

Ms. DAWSON. If I recollect, the things you just read, I believe it covers all of those areas. It remains to be seen whether or not the industry will agree to do things adequately, and I will reserve my judgment on that until I see what their actual——

Mr. CRAIG. Isn't that your option?

Ms. DAWSON. Of course.

Mr. BARNARD. Don't you have a deadline coming in which you will take the rather broad parameters of a general framework and then look at the details as to how that framework will be implemented? Isn't that what February 15 is all about, in a final decision?

Ms. DAWSON. Yes, that is correct.

Mr. BARNARD. Now, am I correct, Chairman Scanlon, that after that decision, whatever it may be—leave us not prejudge it at all—but apparently somewhere there is then an extensive responsibility on the part of the Consumer Product Safety Commission to ensure that it is enforced. Is that correct?

Mr. SCANLON. That is correct.

Mr. CRAIG. And it is your belief that by enforcing that, you will continue to see a progressive decline in injuries?

Mr. SCANLON. Without doubt.

Mr. CRAIG. You say without doubt. How can you be so confident?

Mr. SCANLON. Our economists have already indicated that this past year there has been an 11-percent decrease in hospital treated injuries. They are anticipating a drop to about 25 percent in the next 4 years.

What I do want to say is this: I don't want to leave the impression that this Commission may not be back to the Congress—to the Appropriations Committees requesting a supplemental for the enforcement activity that would be necessary to go along with the final consent decree. We may need more moneys to carry out the enforcement activity.

Mr. CRAIG. We have been led to believe by some who have testified today, Chairman Scanlon, that these injury rates still go up at a very progressive rate. Is that the case?

Mr. SCANLON. That is not the case today. And I would attribute it to a number of things.

One is that you have a much larger market today for four-wheelers than three-wheelers.

Mr. Craig. A shift in consumer buying?

Mr. Scanlon. Yes. A couple of years ago you had about 80 percent of the sales being three-wheelers. Today, in excess of 80 percent of the sales are four-wheelers. So there has been a dramatic switch just in the last 2 years.

Also you have had great media attention—"60 Minutes," "20/20," just to name two—on the ATV safety issue.

The Commission itself conducted six public hearings around the country, which generated much publicity, associated with ATV injuries and deaths

Mr. Craig. Those figures are before us and I appreciate your restating them for the record. I think all you said is accurate. A great deal of the attention focused on enlightening of the public as to the concern about the safety of these vehicles when improperly used.

Commissioner Graham, you disagreed with the preliminary consent decree. Was that primarily because of no refund?

Ms. Graham. That was my main concern, yes.

Mr. Craig. Do you concur with the educational provisions of it?

Ms. Graham. I do. I am concerned that at this point they appear to be very vague, and I hope that in the process of drafting the final decree, it will be specifically outlined in every area what kind of goals are to be accomplished.

Mr. Craig. Am I right in assuming, as has been characterized this afternoon, that a preliminary consent decree is nothing but a broad framework? Is that how you understand it?

Ms. Graham. In this case that is what we have, yes.

Mr. Craig. Therefore, your intent, or you believe that what you will see on the 15th, or prior to the 15th, for your information and decisionmaking, will be a much more detailed approach as to how this broad framework will be implemented?

Ms. Graham. That's my understanding. And I hope that is the case.

Mr. Craig. Is it unusual or is it a normal practice for the Commissioners of Consumer Product Safety Commission not to be involved in the detailed negotiation between, in this case, the Justice Department and the industry involved? Somehow, I have been led to believe by statements and by testimony today that you folks were out of the loop; that you were uninformed; that you were not involved. What is normal? I know this has been a highlighted case, receiving a lot of national publicity, but I have to think you folks make a lot of decisions on a fairly regular basis on a variety of things coming before you. What is normal?

Ms. Graham. I don't know the history, Congressman Craig. I do know that our attorneys advised us that they would keep us informed; that they would do the primary negotiating, and I did meet with the general counsel on several occasions before the preliminary decree was finalized. So I was being briefed by him.

Mr. Craig. Did you object to the attorney's approach to negotiating?

Ms. Graham. Not to the decision to leave me out, but I have always been on record as favoring a voluntary recall.

Mr. Craig. I am talking about the negotiation that went on between Justice and the industry and CPSC's attorneys.

Ms. **Graham**. Well, as I said, the general counsel did brief us as to what was going on, and we were advised it wouldn't be appropriate for us to be involved in it.

Mr. **Craig**. Why would it not have been appropriate?

Ms. **Graham**. I don't know.

Mr. **Craig**. Is this a normal procedure for the Commissioners not to be involved in the negotiations, but to look at findings and draw the conclusions from those?

Ms. **Graham**. I suspect it is, but I can't give a definitive answer because this is the only section 12 case I have ever been involved with. I would be happy to go to the attorneys and respond in writing.

Mr. **Craig**. I am curious. It has been alleged all of you were in the dark. Nobody knew, or at least not until the last minute, and I am just saying now we are finding out that negotiations went forward and you were advised in a 4-hour session and—dealing with at least the framework of a preliminary consent decree.

I guess I would be curious as to what it relates to. Is this a normal procedure, and if you were within your authority to proceed as you did.

Mr. **Scanlon**. If I can comment, Mr. Chairman, on December 16, the Commission voted unanimously to give Justice the authority to negotiate on our behalf.

Mr. **Craig**. Was that an abnormal decision?

Mr. **Scanlon**. No.

Mr. **Craig**. Other Commissioners or Commissions voted similarly on other cases to give Justice authority to do things, to negotiate?

Mr. **Scanlon**. To the best of my knowledge, that is the case.

Ms. **Dawson**. Could I comment on that.

Mr. **Barnard**. You advised——

Mr. **Scanlon**. We refer cases to the Justice Department and they negotiate in our behalf.

Ms. **Graham**. I think—excuse me.

Ms. **Dawson**. I wanted to respond to your earlier question about whether this was routine. As Commissioner Graham says, this is the only section 12 case we have been involved in. However, in other kinds of enforcement matters such as under section 15, our compliance and general counsel attorneys many times do negotiate settlements prior to filing a complaint, and then will come to the Commission and say, "This is what we have been able to achieve. Do you think it is enough? Do you accept it?" And we make a decision.

So in that sense, it is not unusual. The thing that is unusual about this one is that we have another agency involved, and we have another set of attorneys involved.

Mr. **Craig**. All right. I guess one last question, Commissioner Graham, and it relates to the recall refund kind of issue. If the educational campaign would accomplish our safety objectives, that is what it's all about, without a refund program, and it appears if that is going to be the ultimate test, depending on your ultimate decision to settle. Does this indicate that the refund program is aimed not at preventing injuries, but compensating consumers?

Ms. **Graham**. Congressman, my feeling is that the package that we put together in December 1986 was a comprehensive package to reach our safety objectives. I am not convinced at this point that the preliminary consent decree alone will do that. My feeling then and now is if we could have a limited refund, it would add to the safety aspect of the entire effort, and my feeling is that because of the Department of Justice's confidence in putting it in the complaint, that it is a way to reduce injuries and deaths.

Mr. **Craig**. So you are telling me and based on your vote on December 29, that you would prefer if you can't get refunds, voluntarily recall refunds, to go to litigation.

Ms. **Graham**. No, I am not. I am glad I have an opportunity to answer that.

Mr. **Craig**. I think that is very important. We know that side of it and that is a very real concern. Some of us want to get to it now and get solutions.

Ms. **Graham**. I am one of those people. I believe it is a judgment call to a certain extent. The question was whether to file the complaint and the consent decree or file the complaint and continue to negotiate.

I have always been on record to negotiate if we can get a good settlement. The consent decree in and of itself doesn't have the effect that we need to achieve because of the high rate of deaths and injuries.

Mr. **Craig**. The question I would like to ask you and I guess I will not ask for a response from you because I think it might prejudice you in making a final decision, and I think it is important that the record show that we must be careful, Mr. Chairman, in not doing that.

As you have found out, a settlement is in process. There has not been a final decision. My concern is, because we are talking megabucks, 1.5 million vehicles out there and a required refund, it appears that there may be alternatives, but if we then decide to go to court to force that, but I would have to think that industry would react and fight.

It is interesting that Polaris is held up as this great benevolent company that was willing to pay out, pay off and well, they had 1,500 machines in the market, I believe. They manufactured them for 1 year and got out. And I believe that reason was that they were noncompetitive and that they saw some liability problems and they got out. It was easy for them to appear benevolent, very easy. And so I want the record to be sure and show that when they are held up as the example of what should be done, especially when they are held up as an American company, "against the foreign company," as done by several today, that it be known that they had little to lose in dollars.

Now, it so happens that I ride Polaris snowmobiles, and they are a fine company product and have been a fine product, but it is important that the record show that they didn't have hundreds of thousands of millions of vehicles in the marketplace.

Thank you very much, all three of you, for coming. We understand and appreciate—and I think I do—the pressure you are all under in this kind of decisionmaking.

It is tough, but you took the job, and it is your job and you are going to have to make a decision. Thank you.

Mr. **Scanlon**. Thank you very much.

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Mr. BARNARD. Mr. Scanlon, in a communication of November 30, 1987, from you to Mr. Lacey, you wrote:

> Because of the importance and sensitivity of the upcoming ATV negotiations in order to insure optimum communication between your office and the commission, I suggest that all briefings and reports between your office and the commission take place at formal commission meetings attended, as usual, only by those with a need to know.
>
> Since we will likely be called to give the Congress a full accounting of the negotiations, it is my further suggestion that all the suggestions between your office and the commission be on the record. If necessary, formal commission meetings can be scheduled weekly for this purpose. I do not wish to be briefed, nor do I want my staff briefed on the progress of the ATV negotiations, except in formal commission meetings.
>
> Specifically this issue should not be discussed at our daily staff meetings. You may wish to discuss with my colleagues. . . .

So forth and so on.

My question, Mr. Scanlon, is why did you want to advise your general counsel not to keep you informed on the progress of the settlement?

Mr. SCANLON. Very clearly, Mr. Chairman, these negotiations were highly sensitive. There was much interest from outside parties and, I thought, the fewer people that knew, the less chance that the information would be leaked. That's why I wanted all information shared among the three Commissioners at formal Commission meetings with only selected staff persons there who had a need to know.

Mr. BARNARD. Did you not need to be involved in the negotiations?

Mr. SCANLON. I didn't want to be part of the negotiations. I am not part of the negotiations today, Mr. Chairman.

Mr. BARNARD. Well, Mr. Craig, that—that, to me, looks like it is an abdication of responsibility.

Mr. SCANLON. Not at all. I voted for the preliminary consent decree after having 2 weeks of information, and I will vote again in mid-February on the final consent decree, after I know the exact language on the training that is going to be offered, the language that will be on the labels, exactly what the industry is going to provide in its media campaign.

Mr. BARNARD. Well——

Mr. CRAIG. Let me react to your response, Mr. Chairman. I guess I am not too surprised by that. I doubt that you were involved in putting together all the research that you are now using today in the form of condensed questions that an extensive staff put together for you.

Mr. BARNARD. I will say this. I have been in 3 days studying it.

Mr. CRAIG. They are going to go spend time studying and they are going to go make a decision. What is important is what they are charged with. They are charged with putting a staff together to do the research to bring to them information toward and including their ability to make a final decision. I guess that is what I am hearing, and if this is abnormal I would say that is worthy of the question.

I am not arguing that your question isn't worthy. It appears to be they are following a relatively normal procedure.

Mr. **Barnard.** I think this is of such importance, first of all, this Commission voted in December 1986 to do one thing, and then turned around in December 1987 and made a very, very drastic change in what they voted to do. I realize they went through years of discussion and 41,000 pages of print and $2 million.

I realize all that, but it looks to me that even with all of that, they are not asking for the information that will make the decision.

Mr. **Craig.** Congress was saying, "We want action now." That is what we were saying. That is what you did. That is what this committee said, "Give us a decision. We want action." Their choice was action or possibly 4 or 5 years of litigation. They are making a choice out there right now. I don't see that as so darned abnormal.

Mr. **Barnard.** They have made a choice. That is true.

Mr. **Craig.** You may disagree and, I happen to think from where I am coming from that it is clearly a step in the right direction. I am anxious to see the final product. We may want to legislate and I may want to join you at that point.

Mr. **Barnard.** Let me ask Mr. Scanlon a different question.

You say in your statement that when the industry retained what you called top flight legal counsel, you were prompted to revamp your litigation team. Does this mean that the two attorneys with the most experience in working on the ATV matter were taken off the case?

Mr. **Scanlon.** I am delighted you raised that question, Mr. Chairman. Every oversight hearing that I come up for, and there are so many these days, that question is asked and I am so happy that I can answer on the record in this committee hearing.

As part of the 18-member task force that I referenced earlier, there were 3 attorneys assigned to that. Three of the 18 were attorneys.

When we got to the point where it was possible that we would have litigation and the industry had retained Lloyd Cutler and other top flight Washington attorneys, I felt it incumbent to pick the best attorneys that we had. These were the best and the brightest. I did that. I picked the best four attorneys we had in-house with backgrounds that would help the Commission win its case, if it were litigated. That is exactly what I did.

One of those attorneys who was replaced had announced his intent to resign from the Commission 3 months prior to his departure. On the very last day before he left the Commission, he announced that he wanted to stay, as he called it, a few weeks to continue participating in ATV decisions. He had already been replaced by the general counsel.

There was no need for him to stay at the Commission. I think, and the Justice Department agrees, that we have the best attorneys in-house on this case and that was my responsibility to do just that.

Mr. **Barnard.** Ms. Dawson and Ms. Graham, do you agree with that?

Ms. **Dawson.** I don't want to impute the professionalism of any of the attorneys that we now have working on this case because I think they are all good people. I happen to have disagreed with the Chairman's action, which was, I believe, back in May of last year. I happen to have felt, and went on record at the time, that those two people were critical to this case.

I regret that action. Apparently, it was not something which—or at least I was told it was not something which—was in my prerogative as a Commissioner to determine. Nonetheless, again—I don't want to detract in any way from the talents of the attorneys that we now have. But, I will say that those other two attorneys were excellent, and I had every confidence in them.

Ms. **Graham**. May I add that I agree with Commissioner Dawson and, I would add that those two attorneys had 3 years of experience on the ATV case and, that that was extremely important. And they have my unequivocal support. I think we could have moved more quickly had they remained on the case.

Mr. **Scanlon**. I might add that the one attorney remaining as an attorney is now a special assistant to Commissioner Graham, working on the ATV case.

Ms. **Graham**. I am most grateful to Chairman Scanlon for detailing her to my office.

Mr. **Barnard**. I believe we were making progress. Ms. Dawson, not meaning to pick on you, but you played a very significant roll in this decision, and I am interested in knowing what are your thoughts as to the role that the Justice Department played in your decision?

We have been informed by several sources that the Justice Department indicated that it would expect to be compensated from the Commission to the extent of $3 million per year for about 3 years. What influence did this statement have on you agreeing to avoid litigation?

Ms. **Dawson**. Mr. Chairman, I am happy to respond to that. As you know, the Commission has already spent several million dollars on this project and all of it, I think, was money well spent. I would not have flinched from going ahead with litigation, if it was what I felt was necessary, because of the expense. In that case, it would have been a prudent course of action for us to come back to the Congress and ask for additional funds that were needed.

Whether they came from the Justice Department or from the CPSC really would have made no difference. They would all come from the U.S. Treasury, so I can't say that that particular topic had any influence on me one way or the other.

Mr. **Barnard**. Ms. Graham, do you recall that that statement was made?

Ms. **Graham**. Yes, I do and it really didn't have any effect on me whatsoever, because I felt that we needed to move ahead and, I was quite prepared, unlike other circumstances, to come and ask for more money.

Mr. **Barnard**. At that particular meeting, was any statement made comparable to the one made by—Deputy Assistant Attorney General Robert Cynkar in his interview when he said that, "It was our opinion and the CPSC's that we had no chance of winning in court on that one"?

Ms. **Graham**. I never heard him say that, no.

Mr. **Barnard**. Do you recall that, Ms. Dawson?

Ms. **Dawson**. I don't want to speak for Mr. Cynkar. We may be getting into an area where we may be disclosing some things which should not be disclosed, which would affect our litigation strategy. So I would not want to respond to that question on that basis.

Mr. BARNARD. Do you have any further questions, Mr. Craig?

Mr. CRAIG. No, I don't think so, Mr. Chairman. Thank you, all three.

Mr. BARNARD. This has been a very interesting hearing today, and we appreciate your being here and we appreciate the patience that you all have had in waiting to be the last to come before this group. I don't know that any concrete, final, mutual decisions have been made from these hearings. I think that we have cleared the air pretty well as to what the settlement includes and what a lot of folks think about the settlement.

From the way I stand, Mr. Craig, I really believe that the Commission's job is not finished. I really think that there is still further evaluation that should go into this decision. I would hope that the decision that you make after February 15 will be somewhat influenced by what you have heard today, and the questions that have been asked, and the feelings expressed by some members of the Congress. Without any further comments, the subcommittee is adjourned.

[Whereupon, at 3 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

Appendix 1.—Statements Submitted for the Record

CONSUMER FEDERATION OF AMERICA

MICHAEL BISHOP, SAFETY COORDINATOR FOR THE CALIFORNIA ALL-TERRAIN VEHICLE ASSOCIATION

DONALD J. HANAWAY, WISCONSIN ATTORNEY GENERAL

CFA Consumer Federation of America

STATEMENT

BEFORE THE

SUBCOMMITTEE ON COMMERCE, CONSUMER and MONETARY AFFAIRS

of the

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

on

ALL-TERRAIN VEHICLES

by

SUSAN A. WEISS
Legislative Representative

Consumer Federation of America

January 28, 1988

1424 16th Street, N.W., Suite 604 • Washington, D.C. 20036 • (202) 387-6121

Mr. Chairman and members of the Subcommittee, I am Susan Weiss, Legislative Representative for Consumer Federation of America. CFA is the nation's largest consumer advocacy organization, representing over 240 local, state and national consumer organizations with a combined membership of over 50 million people.

Product safety and the actions of the U.S. Consumer Product Safety Commission (CPSC) are among CFA's highest priorities. Monitoring of the Commission over recent years has revealed a rather dismal picture of this nation's watchdog for product safety. The CPSC has dragged its feet on critical regulatory intervention for dangerous products, choosing too often to defer to industry's timetable for voluntary action. Consumer protection however reached an all time low on December 30,1987, when the Commission entered into the preliminary consent decree concerning All-Terrain Vehicles (ATVs).

With a death toll now exceeding 900 and serious injuries exceeding 330,000 from these "family fun" vehicles, the Commission has ceded to terms woefully inadequate to prevent ongoing devastation from ATVs. Despite labeling ATVs imminently hazardous and despite determining in December 1986 to seek refunds under its Section 12 authority, the Commission one year later has done an about-face. By agreeing to abandon the refund provision, the Commission has left the consumer holding the bag. In effect, the Commission has deleted its means of at least reducing the number of and risks from three-wheeled ATVs and adult-sized ATVs bought for children currently in the marketplace. The settlement also fails to provide adequate protection for the nation's children who represent nearly half of the victims of these "killer machines". By its very terms this decree demands scrutiny.

We welcome the decision of this Subcommittee to review CPSC actions with respect to this settlement and appreciate the opportunity to submit a statement for the record. Your vigorous efforts and those of your colleagues to reign in this agency and address through legislation the product safety vacuum it has created grow more vital all the time. The agency simply cannot be allowed to drag its feet and then rush into an incomplete response to a hazard on the magnitude of ATVs and call that protection. Intervention is warranted -- and necessary.

This settlement is being heralded by its proponents as expedited action, affording badly needed protection, in lieu of lengthy litigation. We hardly argue against the need now for safety measures for these hazardous vehicles, if they are to remain on the market. However, we must question why the CPSC tolerated the nearly one year delay by the Department of Justice in bringing this action and further why it did not recognize the urgency for these safety measures by assuring the expedited development of standards nearly three years and 300 deaths ago, when it initiated rulemaking.

In the spring of 1984, the CPSC published its Advance Notice of Proposed Rulemaking (ANPR), the first step in setting standards for ATVs. Instead of direcring its staff to develop mandatory standards, CPSC in effect sat back and waited for the industry to develop a voluntary standard. The draft voluntary standard eventually forthcoming addressed only minimum age recommendations, standardizations of controls, labeling and education and training. The standard overall was considered to be inadequate by CPSC staff, according to the Report of the ATV Task Force, dated September 30, 1986. Still, with the death toll mounting, the CPSC did not change its course to begin development and publication of mandatory standards in a proposed rule -- phase 2 in the standard-setting process. Instead it allowed the industry to continue along with developing voluntary standards, without setting any deadlines for regulatory action.

The result is that there is still no adequate safety standard governing ATVs. Instead, nearly 3 years since publication of the ANPR, we are being told that much of the relief that could have been achieved through timely rulemaking now mandates the acceptance of this inadequate decree -- to assure consumer safety. This provides a disturbing backdrop to the glaring deficiencies in the decree.

Careful review of the decree reveals that many years of investigation and millions of taxpayer dollars later, we are left with a settlement that retreats from rather than advances a solution for this imminent and unreasonable hazard. The settlement is rife with deficiencies. Many are set forth in the action filed this week on behalf of CFA and other health and safety organizations, requesting that the Court hold a hearing before the agency is permitted to enter any final consent decree.

Of paramount concern is the fact that the decree does nothing to get used three-wheeled vehicles off the market nor does it effectively remove these vehicles from the hands of children under 16, the group at highest risk from these killer vehicles. Further the decree even leaves the door wide open for the sale of at least certain four-wheeled ATVs to children under 12 years of age.

By limiting the stop sale provisions only to three-wheeled ATVs -- and new ones at that, the decree creates a dangerous impression that three-wheeled ATVs are unsafe while four-wheeled ATVs by contrast are safe, which recent statistics do not bear out. In the first five months of 1987, nearly 45% of deaths reported to the CPSC involved four-wheeled ATVs.

The decree ties the agency's hands in exercising its authority under Section 15 of the Consumer Product Safety Act and the Federal Hazardous Substances Act for at least a year, regardless of whether deaths and injuries continue to mount in the face of this agreement. The decree is ambiguous at best with respect to enforcement, raising the question of who enforces the provisions and how. Is CPSC possibly capable of monitoring an estimated 5000 dealers for compliance? What are the sanctions for non-compliance by the point-of-sale dealer not a party to this decree?

The decree also creates a "safety verification form". While we heartily support comprehensive consumer notification, particularly if these vehicles are to remain on the market, the laundry list of "nevers" on this safety form suggests itself as more industry protection in a product liability action than consumer protection. Its implications must be carefully reviewed.

Paragraph M in the decree raises serious questions as to what survives the preliminary consent decree. While there is explicit agreement on those provisions to be incorporated in the final decree, paragraph M is conspicuously silent as to whether the stop-sale provisions, age limits in advertising and labeling provisions will in fact be part of the final decree.

In light of the rulemaking history for ATV standards, the standards provision in the decree is woefully inadequate. The manufacturers only "agree to attempt in good faith to reach agreement on voluntary standards". Does this process contemplate public comment? And more importantly, what happens if it fails to produce an adequate standard? After all these years of attempting to generate standards, at a minimum there should be more than this to assure effective safety standards for these dangerous vehicles.

These provisions of the decree, coupled certainly with others, must raise the question of exactly whom the Commission voted 2 to 1 to protect. While education, training, warnings and other safety measures are surely welcome, and certainly long overdue, they simply are not sufficient now to assure that the carnage from these vehicles will cease. The deficiencies in the decree bespeak the need for continued leadership in passing legislation that would afford effective safety measures for ATVs and revive a sleeping product safety agency. We strongly support your vigilence and that of your colleagues in pursuing this end.

STATEMENT OF MICHAEL BISHOP BEFORE THE SUBCOMMITTEE ON COMMERCE CONSUMER AND MONETARY AFFAIRS, COMMITTEE ON GOVERNMENT OPERATIONS, U.S. HOUSE OF REPRESENTITIVES, JANUARY 28, 1988

Mr. Chairman, distinguished members:

I am pleased to submit this statement for your consideration. I have been asked to share with this Subcommittee my experience with and analysis of all terrain vehicles (ATVs) and their use by children.

To put my views into perspective, I have been riding ATVs for 9 years. I am the Safety Coordinator for the California All Terrain Vehicle Association, a 500 member organization of ATV riders. I am an SVIA certified ATV instructor and, even before that program, I started the Pismo State Beach Dune Patrol. This volunteer Dune Patrol helps supervise off-road vehicle operation at Pismo Beach, California's most active ATV riding site. We help inform riders of safety equipment requirments, give instruction and investigate accidents at the beach. I am also the Safety Consultant of ATV Sports Magazine, formerly Three Wheeling Magazine. This publication is the oldest monthly ATV information source for the ATV consumer.

I have an additional qualification that should be of interest to this Subcommittee. I am the "expert" rider who rode 18 models of ATVs for the CPSC technical staff when they used their motion analyzer to measure the amount of rider influence necessary to operate those ATVs. With this background and after reviewing the

CPSC data on ATVs I believe that I can point out some facts that have been overlooked in the discussion of ATVs.

I have experience in the operation of ATVs by children from two standpoints. First, I taught my children to ride ATVs. Second, the Pismo Beach Patrol also teaches children how to ride ATVs. I find my experience in that situation is also supported by a careful review of the CPSC data on ATVs.

First, age is not an accurate predictor of the ability to safely operate an ATV. I have seen many children as young as 5 and 6 safely operate ATVs properly sized for their use. On the other hand, I have also encountered adults who could not safely operate an ATV, regardless of their training. As with any motor vehicle, some people do not have the capability to safely operate ATVs. However, age is not the determining factor. So long as children physically fit the machine and can reach all the controls, they can operate ATVs as well as anyone. The key to safe operation by children is parental training and supervision. Particularly, younger children need guidance where an ATV can be operated safely and what maneuvers are within their capabilities. Absent such guidance, children will gain this knowledge through a process of trial and error.

In my survey of accidents involving ATVs at Pismo Beach over a 5 year period, I found that in 80% of the accidents involving children, their parents were not near the scene when the accident occurred. Further, we found no accidents in which a child was operating an ATV with an engine size of 80cc or smaller. These smaller machines do not have the power or size to produce the scenarios that we find are involved in most accidents.

In making inquiries about the CPSC data on children and accidents, I found that the CPSC Hazard Analysis published in December 1985 said that in about 75% of the accidents of children under 14, parents were not near the scene of the child's accident. That should not happen. Regardless of what anyone else may have told you, you cannot deal with an ATV without realizing that an ATV is a serious motor vehicle. It is not going to fool anyone. ATVs weigh 200 pounds or more, they have motorcycle-type engines, they are loud and do not look like a toy. Any parent who turns his or her child lose with such a vehicle can hardly claim surprise if something goes wrong, anymore than if they had given the keys to a motorcycle or a car to their child and then walked away.

I also tried to find out if there was any difference in the accident rates or experiences for children with ATVs and other forms of children's recreation. The most recent CPSC summary of accidents for 1985 shows that two related products, dirt bikes and mopeds, have injury rates for children under 15 of 36.7% for dirt bikes and 29% for mopeds. ATVs, according to CPSC, have a 35% rate for the same age group.

That same CPSC publication shows 394,000 bicycle injuries for children in this age group (even after CPSC published an extensive regulation on bicycles) and 45,700 injuries in roller skating. Even things such as playgrounds (138,000 injuries) and football (132,500 injuries) that we accept in our everyday life present far larger injury risks.

All of this leads me to believe that the people who are not familiar with the many benefits of families on ATVs have chosen to push for drastic efforts to protect those of us who ride these machines, without understanding that we do not need this help. There are very few things left that a family can do together nowdays. When you consider that ATVs also allow a parent to help his or her child develop their confidence in an activity the parents can share, ATVs are a rare and welcome opportunity. Just because some parents do not accept or discharge their responsibilities should not mean that all of us should suffer.

When you look at injuries to our population, the National Safety Council figures show that people between the ages of 15 to 24 have the highest rates of accidental deaths. This is probably not news to anyone who has tried to get automobile insurance for anyone in this age range. What these figures do show is what anyone who works or spends time around children and people in these age ranges already knows, certain age people take more risks. What I do not understand is what CPSC is doing about 16 to 24 year olds. At least the younger children of 12 to 15 are still subject to parental control. I do not see how the government is going to do something if the parents will not act.

Age labels on ATVs are not going to stop people from taking risks any more than the same labels on skateboards would help. Now in California skateboard injuries are growing rapidly each year and I understand this is true for the rest of the country. The problem is not the skateboards, it is that people who are drawn to these activities are most likely going to do something like this, whether it is skiing, dirt bikes, dune buggies or any other activity.

The only surprise I received when I inquired about CPSC data for children's accidents is that the government's own figures do not support a charge I have heard repeated several times. That is, the CPSC data do not show that the younger you are, the more likely you will be injured. When you look at the individual age groups in the CPSC ATV Task Force Report, risk of injury for children under 12 is lower than that for older people. This is true even when you include those young children under 12 riding machines with engine sizes greater than 80cc and does not change until you get into these children on ATVs over 200cc. That surprised me but, I am informed, this is the same kind of injury distribution that you get for almost all product related accidents. Persons under 12 and over 25 have less accidents and the population from 13 through 24 is the high risk population, regardless of the product or activity.

The only reason I see for children getting into more accidents as they reach 13, 14 or 15 is lack of supervision. If they have been trained properly or if they are supervised, they operate ATVs as well as or better than most adults. It is when there is no attempt by the parents to train or supervise their children that you get risky situations where they attempt to show off or succumb to peer pressure. However, this is no different than what I see with dirt bikes or skateboards.

In conclusion, my lengthy exposure to the CPSC hearings and this whole process leads me to conclude that the government came across a new sport that was not understood in Washington, D.C. This is unfortunate because the majority of riders have now been tarred with the same brush as drunks and other irresponsible individuals. The government overreacted before it understood the sport or the riders. Now the government has made all kinds of statements about how bad things are and cannot back them up. In my opinion, it is time to stop tinkering with this sport and let the information, training and labeling campaigns everyone just agreed to go to work. To demand some kind of recall or buy back of three and/or four wheeled ATVs just condemns those machines unnecessarily and lowers the fair value of the ATVS belonging to those of us who have used them responsibly. If someone who has an ATV now doesn't want it, there is a thriving used ATV market. Now that you have driven three-wheelers off the market, used three-wheelers are the only way you can get one. Let the market place take care of any economic worries.

If that does not work, then the government should explain to the Congress what happened. Everyone at CPSC, the Department of Justice and the industry says the safety points have been addressed. Why not give us a chance to see what happens before you do anything more to us?

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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February 15, 1988

Ted Jacobs
House Subcommittee on Commerce, Consumer
and Monetary Affairs
Post Office Box 377
Rayburn House Office Building
Washington, District of Columbia 20515

RECEIVED
FEB [illegible]
COMMERCE, CONSUMER AND
MONETARY AFFAIRS SUBCOMMITTEE

Re: All Terrain Vehicle Settlement

Dear Mr. Jacobs:

Enclosed please find the Statement of Wisconsin Attorney General Donald J. Hanaway Before the Subcommittee on Commerce, Consumer and Monetary Affairs, House Committee on Government Operations, All Terrain Vehicle (ATV) Settlement.

I understand that this statement will be included in the hearing record.

Please contact me if you have any questions regarding this matter.

Sincerely yours,

Barbara W. Tuerkheimer
Assistant Attorney General

BWT:tmb

Enclosures

STATEMENT OF WISCONSIN
ATTORNEY GENERAL DONALD J. HANAWAY
TO THE
SUBCOMMITTEE ON COMMERCE, CONSUMER AND MONETARY AFFAIRS
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
ALL TERRAIN VEHICLE SETTLEMENT

Submitted February 15, 1988

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to comment on the terms of the U.S. Consumer Product Safety Commission's preliminary settlement with the all-terrain vehicle (ATV) industry.

For some time now, I, along with many other Attorneys General, have been appalled by the staggering number of fatalities and catastrophic injuries associated with ATV use.

Wisconsin has the third highest number of ATVs in the country; it is estimated that there are over 90,000 in use in our state today. Not surprisingly, in the last five years we also had the third highest number of ATV-related fatalities, with accidents claiming at least 46 lives. Nationwide there have been over 900 deaths and 330,000 serious injuries linked to ATVs, approximately half of them involving children.

I was encouraged to learn that the Justice Department filed a complaint against the ATV manufacturers alleging that the risk of harm presented by these vehicles is both "imminent and unreasonable." However, the proposed settlement, while a positive first step, falls far short of achieving a level of protection that is desirable and was sought by the complaint.

While there are several areas in the preliminary decree I feel need strengthening*, there are three major deficiencies I must address. The decree fails to: 1) effectively protect our children from needless death and injury; 2) provide for a voluntary repurchase program for all prior ATV purchasers; and 3) adequately inform purchasers of ATV risks without jeopardizing their rights.

ATVs AND CHILDREN

One of my major concerns with the settlement decree is its failure to effectively protect our children and adolescents from the unnecessary devastation caused by ATVs. This is indefensible.

Nearly half of the ATV-related fatalities are children under sixteen; twenty percent are under twelve years old. More than half of the injury victims are children under sixteen years old. This means that since 1982, approximately 400 ATV-related deaths and over 150,000 hospital emergency-room-treated injuries involved children under sixteen. How many more of our innocent children and their unsuspecting families must suffer before decisive measures are taken?

The Justice Department complaint correctly alleges that the risk of harm presented by ATVs is substantially magnified when they are operated by children under sixteen. ATVs are complex and dynamically unstable vehicles, requiring quick perception, decision and reaction times and precise rider manipulation; there is virtually no margin for error. The penalty for making the smallest miscalculation may be death or catastrophic injury.

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* See Amici Curiae Brief of the various states submitted with this statement for inclusion in the record.

Both the American Academy of Pediatrics and the American Academy of Orthopaedic Surgeons tell us that no child under the age of sixteen should be permitted to operate any ATV. Youthful operators lack the cognitive abilities, judgment, physical size and strength, motor skills, coordination, experience and perception that are essential to safely operate an ATV. This, combined with a tendency toward high-risk taking, a feeling of indestructibility and an exaggerated sense of independence, makes an ATV in the hands of this age group an accident waiting to happen. Unfortunately, the grim statistics bear this out.

So far, the manufacturers of ATVs have been inordinately slow in addressing the gravity of these statistics. A representative of Honda, at a meeting with Attorneys General in Los Angeles last December, rationalized youthful ATV deaths and injuries by saying "the teenage years are a risky time of life." That attitude is outrageous and completely unacceptable.

Although the Justice Department complaint acknowledges the risks of ATVs to youthful operators, the settlement is woefully deficient in addressing this area. The preliminary decree does nothing to restrict the use of child-sized ATVs by children under twelve. The decree does nothing to prevent further carnage to children whose unsuspecting parents bought into the marketing hype and purchased an adult-sized ATV for their children believing them to be solid, stable and easy to operate.

I believe we have a special responsibility to protect our children. I strongly urge, as do many other Attorneys General, that the Consumer Product Safety Commission use its authority to ensure that all child-sized ATVs be banned immediately and sales of adult-sized ATVs to or for the use of children under sixteen be prohibited. Nothing less is acceptable.

ATVs are not toys; they are highly dangerous vehicles that are killing and maiming our children. Children under the age of sixteen are not permitted to operate a car in most states; they should not be permitted to operate an ATV.

VOLUNTARY REPURCHASE PROGRAM

The decree also further fails to protect our children because it does not provide for a voluntary repurchase program. Although a refund program for all three-wheeled ATVs and all adult-sized four-wheeled ATVs purchased for use by children under sixteen was sought in the complaint, there is no consumer refund provision in the settlement decree. This is indefensible.

The offer of a reasonable cash refund would be an incentive for people to surrender their ATVs, thereby curtailing the number of these hazardous vehicles in use and reducing the number of deaths and injuries. At a minimum, refunds for purchasers of three-wheeled ATVs which are being taken off the market should be required, but refunds should also be available to anyone who purchased a four-wheeled ATV.

Consumers who purchased ATVs did not have the benefit of notice and warnings of the risks and hazards associated with this product that the consent decree requires manufacturers to henceforth provide to all purchasers. To the contrary, these vehicles were misrepresented as safe and reliable--fun the whole family could enjoy.

The industry must be held accountable for engaging in a pattern of false and deceptive advertising and provide restitution for any consumer who is a victim of such practices.

SAFETY VERIFICATION FORM

Finally, I would like to address the harmful potential of the Safety Verification Form for shielding defendant manufacturers from liability from the sale of a dangerous and defective product.

While I support the concept and purpose of providing full disclosure of the dangers of ATV use to prospective purchasers, the form as is proposed appears to shift complete responsibility to ATV purchasers and immunize the manufacturer from faultily designing its product. This is not only unconscionable; it is unheard of.

I urge that the final decree and the Safety Verification Form include a statement to the effect that the purchaser's signature on the form, or proof that the information contained therein was explained to him or her, in no way constitutes a waiver or assumption of the risk by the purchaser. In this way consumers do not have to sacrifice their rights in order to be adequately informed about the product they are purchasing.

I applaud the achievements of the preliminary consent decree. However, it does not provide to the American public the full measure of protection from the imminent and unreasonable hazards posed by ATVs that it is entitled to and that is mandated by the Consumer Product Safety Act. The American public, the American children, deserve no less.

I offer the resources and full cooperation of my office in achieving our mutual goal of ensuring the safety of our citizens.

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

UNITED STATES, Plaintiff, v. AMERICAN HONDA MOTOR CO., INC., et al., Defendants.	)	CIVIL ACTION NO. 87-3525 (SS) (Sporkin, J.) BRIEF OF AMICI CURIAE STATES

I

INTRODUCTION

Amici curiae, the States of Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Tennessee, Texas, Vermont, West Virginia, and Wisconsin file this brief in support of plaintiff's complaint because of the great danger all-terrain vehicles (hereinafter "ATVs") pose to the citizens of their various states. Each such state could bring a separate action against defendants herein based upon violations of its own state unfair and deceptive practices law.[1] The states wish to make their views known through this Amicus Curiae Brief so that all issues can be resolved at this time, thus sparing the judicial system and defendants duplicative actions, which are in no one's economic interest.

It must be reemphasized that, as stated in our Application for Leave To File Amicus Curiae Brief, the states have no desire to jettison the achievements of the Preliminary Consent Decree. Rather, Amici hope that in making the order final, this Court ensures that such order effectively solves the problems raised by plaintiff's Complaint and that protection of the public, as mandated by the Consumer Product Safety Act (hereinafter "CPSA"), 15 U.S.C. § 2051, as amended, is achieved. Such can be accomplished, Amici believe, with only slight modification of the Preliminary Consent Decree (hereinafter "Decree"). It is for this reason that Amici sought leave to file this Amicus Curiae Brief with the Court rather than seeking to become a formal intervenor pursuant to Rule 24 of the Federal Rules of Civil Procedure. The states seek nothing more than to be certain that this Court has before it the views of various Attorneys General on the issues raised in the Consumer Product Safety Commission (hereinafter "CPSC") Complaint and makes certain that the Final Order solves the problems addressed therein rather than creating new ones.

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[1] See e.g., Alaska Stat. 45.50.471-45.50.561; Cal. Bus. & Prof. Code §§ 17200 et seq. & 17500 et seq.; Conn. Gen. Stat. § 42-110a; Ill. Rev. Stat., ch. 121 1/2, §§ 261, 311; Fla. Stat. ch. 501; Ind. Code 24-5-0.5; Me. Rev. Stat. Ann. § 207 (1979); Md. Com. Law Art. §13-301; Mass. Gen. Laws Ann., ch. 93A; Mich. Comp. Laws § 445-901; Minn. Stat. Ann. §§ 325 D .44 & 325 F .69; Mo. Rev. Stat. § 407.010; Nev. Rev. Stat. 598.360-598.640; N.J. Stat. Ann. 56:8-1 et seq.; N.Y. Gen. Bus. Law § 349; N.C. Gen. Stat. 75-1.1; N.D. Century Code, §51-15-01 et seq.; 15 Okla. Stat., Supp. 1987 § 751 et seq.; Ore. Rev. Stat. § 646.608; Tenn. Code Ann. § 47-18-101; Tex. Bus. & Com. Code Ann. § 17.41; 9 Vt. Stat. Ann. 2451 et seq. and Wis. Stat. §§ 100.18 & 100.20.

In agreeing to sign the consent decree presented, this Court, of course, must satisfy itself that, in a case such as this where the government is taking action to protect the public, the agreement between the parties is consistent with the public objectives Congress sought to foster when it adopted the legislative scheme under which the action is brought and sought to be settled. See, United States v. City of Miami, Florida (5th Cir. 1981) 664 F.2d 435, 440-441 and Metropolitan Housing Development Corporation v. Village of Arlington Heights (7th Cir. 1980) 616 F.2d 1006, 1014. As stated in Citizens For A Better Environment v. Gorsuch (D.C. Cir. 1983) 718 F.2d 1117, cert. denied, (1984) 467 U.S. 1219, rehearing denied (1984) 468 U.S. 1204:

> ". . . the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement.
>
> "...
>
> ". . . 'prior to approving a consent decree a court must satisfy itself of the settlement's "overall fairness to beneficiaries and consistency with the public interest".'" At 1125-1126.

Amici believe that consideration of the points raised herein and modification of the Decree along the lines suggested will result in a Final Order which effectuates the purpose of the

CPSA, is consistent with the public interest and deals effectively with the serious problems raised by the CPSC complaint.

To better focus upon the necessity of a comprehensive Final Order which provides such protection to the public, it is important to keep in mind the product with which the Court is dealing -- ATVs -- and the allegations plaintiff makes in its Complaint.

As plaintiff states:

> "1. The United States of America, . . ., brings this action . . . to protect the public from the imminent and unreasonable risk of death and severe personal injury presented by motorized vehicles known as 'all-terrain vehicles,' or 'ATVs.'
>
> "2. Each day millions of individuals, a large number of them children under the age of 16, are unwittingly exposed to the risk that, as a result of their operation of ATVs, they will be involved in an accident in which they will either die or suffer a severe personal injury such as quadriplegia, paraplegia, a ruptured organ, or a skull or bone fracture.
>
> "3. Far from being safe, easy-to-ride vehicles for harmless play, as defendants have falsely and deceptively represented them to be, ATVs actually are unique and complex vehicles, requiring for their successful operation constant and precise rider manipulation which is neither instinctive nor easily mastered by a person of ordinary skill. Moreover, in contrast to the operation of other motor vehicles and unbeknownst to ATV riders, there is virtually no margin for error in the operation of ATVs because of their peculiar operating characteristics, and the penalty for making the smallest miscalculation may be death or a severe injury.
>
> "...
>
> "5. The United States brings this action to gain the immediate relief necessary to protect the public from the unreasonable and imminent peril in which the defendants have placed, and continue to place, the

> millions of innocent, inadequately informed individuals who presently operate, or will in the future operate, ATVs." (Complaint, ¶¶ 1-3, 5.)

Faced with a problem of such gravity, Amici are interested in seeing that the citizens of their states receive under the terms of the Final Order entered by this Court, the full protection which Congress intended them to have with the passage of the CPSA. That this Court has jurisdiction to enter such a comprehensive order is without doubt. The CPSA gives this Court jurisdiction to issue a mandatory order requiring the notification of the risk posed by an imminently hazardous consumer product, i.e., a consumer product which presents imminent and unreasonable risk of death or severe personal injury, to purchasers of the product known to the defendant (or defendants); public notice of the risk; and the recall, repair or replacement of, or refund for, the product. (15 U.S.C. § 2061(b)(1).)

Under our federal system of government, the CPSC has primary responsibility to protect the citizens of all states from dangerous and hazardous products. Amici believe that the CPSC has failed to meet its obligation in the case of ATVs. While the CPSC Complaint against the industry acknowledges that ATVs are imminently and unreasonably hazardous, the Preliminary Consent Decree of December 30, 1987, has several deficiencies which, if left uncorrected, will result in death and injury which can be prevented.

Amici have been unable to discover any other hazardous consumer product sold which has been responsible for more deaths and injuries in as short a period of time. In the past five years alone, over 900 people have died, and 330,000 people have been injured in ATV related accidents. Nearly half of those killed and injured have been children. Stronger action than is proposed in the Decree has been taken by the federal government following far fewer deaths associated with the use of other consumer products.[2]

As the chief legal officers of the states, the Attorneys General have the responsibility for enforcing state consumer protection laws. Although the CPSC has the primary duty for insuring the safety of consumer products, Attorneys General must also act when their citizens are victimized.

Amici have studied the ATV issue in depth. We have met with one of the defendants herein (Honda), we have consulted experts and we have studied and reviewed the CPSC report on ATVs.

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[2] Recent recalls for repair or refund of consumer products have been instituted on the basis of far fewer than the 900 deaths and 330,000 injuries related to ATVs. Examples are noted in the 40th Report by the Committee on Government Operations, July 16, 1986 (House Report No. 99-678) on ATVs. In 1978, the Ford Pinto was recalled after 61 deaths, following a determination by the National Highway Traffic Safety Administration that the vehicle was unsafe because the fuel tank could explode when hit from the rear. About 1.4 million Pintos had been marketed.

In 1977, CPSC declared a ban and recall of TRIS-treated apparel and fabric for children's sleepwear. TRIS, a chemical fire-retardant, had been linked as, though not conclusively proven to be, a carcinogenic and mutagenic to humans.

In 1980, Proctor & Gamble Company voluntarily withdrew its Rely brand tampons. The Centers for Disease Control had reported that a study of 50 women showed an association between usage of the tampon and toxic shock syndrome ("TSS"), a life-threatening illness. Twenty-five deaths since 1975 had been attributed to TSS.

The recommendations made below present our views on how to make the Decree more effective. Our chief concerns center on the importance of getting currently manufactured three wheel ATVs out of circulation and permanently banning child-sized ATVs, prohibiting the use of ATVs by children under 16 years of age, requiring the adoption of a meaningful performance standard, instituting a consumer refund program for all ATV purchasers, insuring that future ATV advertising is nondeceptive, and making certain that the "ATV Safety Verification Form" does not take away consumers' rights. Specifically, Amici feel that the Preliminary Consent Decree should be modified so that it:

1. Bans all child-size vehicles, i.e., those designed for use by minors under the age of 16, and prohibits sales of ATVs to or for use by minors under the age of 16;

2. Provides for the adoption of a meaningful ATV performance standard within one year from the adoption of the Final Order;

3. Provides for refunds for all prior ATV purchasers since they were misled into buying ATVs by the defendants' deceptive marketing and advertising practices;

4. Adequately insures the truthfulness of future ATV advertising and makes certain that the Public Awareness Advertising Campaign and point-of-sale notices and warnings adequately disclose the dangers associated with riding an ATV; and'

5. Provides that the "ATV Safety Alert" and the "ATV Safety Verification Form" will adequately inform prospective purchasers of ATVs of the dangers inherent in the use of ATVs and that a purchaser's signature upon the "verification" form cannot be later used by defendants as a defensive ploy in future actions brought by an injured ATV rider or such rider's survivors.

Amici will now turn to a discussion of these points as they relate to the Preliminary Consent Decree.

II

ALL CHILD-SIZED ATVs SHOULD BE BANNED AND NO ATV SHOULD BE SOLD FOR USE BY A CHILD UNDER 16.

It is the position of the states that children are not able to adequately handle ATVs. Therefore, adult-sized three or four wheel ATVs should not be sold for use by children under 16 and the manufacture and distribution of child-sized ATVs should be banned entirely.

A. The CPSC Complaint.

The Complaint alleges that each day millions of individuals, a large number of them children under the age of 16, are unwittingly exposed to the risk that, as a result of their operation of ATVs, they will be involved in an accident in which they will either die or suffer a severe personal injury such as quadriplegia, paraplegia, a ruptured organ, or a skull or bone fracture. The Complaint further alleges that the risk of harm presented by ATVs is substantially magnified when they are operated by children under 16. Amici agree.

The Complaint correctly recognizes that ATVs are unique, complex, and dynamically unstable vehicles, requiring quick perception, decision and reaction times, and precise rider manipulation which is neither instinctive nor easily mastered by a person of ordinary skill. There is virtually no margin for error in the operation of ATVs because of their peculiar operating characteristics. The penalty for making the smallest miscalculation may be death or catastrophic injury.

B. Greater Risk To Children.

The problems caused to children by ATVs must be dealt with now because children under 16 who operate ATVs are at an even greater risk of injury and death than adults. They do not have the judgment, constant attentiveness, and high degree of skill to integrate the ATV with varying environments. They also lack the counter-intuitive skills necessary to make split-second decisions that could mean the difference between life and death. Typically, children under the age of 16 lack the cognitive abilities, physical size and strength, motor skills, experience and perception to operate an ATV safely. All of this, combined with a tendency toward higher risk-taking attitudes than most adults and an assumption of a posture of exaggerated independence, inhibits children under 16 from recognizing the dangers inherent in ATV riding and the importance of operating ATVs within their skill levels.[3]

Nearly half of the ATV-related fatalities are children under 16 years old. Twenty percent are under 12 years old. More than half of the injury victims are children under 16 years old. Since 1982, approximately 400 ATV-related deaths and over 150,000 hospital emergency-room-treated injuries involved children under 16.[4]

Children under 16 cannot operate cars in most states; there is no reason they should be operating ATVs. ATVs are not toys. They are vehicles that in the hands of experienced drivers can produce death and catastrophic injury. They are even more dangerous in the hands of inexperienced and immature children. The Final Decree must protect our children.

C. Inadequacy of the Preliminary Consent Decree.

Although the Complaint clearly recognizes the dangers ATVs pose to youthful operators, the Decree fails to deal with this issue. The provisions in the Decree that require the defendants to represent that ATVs with engine sizes of 70 cubic centimeter displacement ("ccd") up to 90 ccd should not be used by children under 12 and ATVs with engine sizes of greater than 90 ccd should not be used by children under 16 do not adequately address the problem. Under the Decree, very young children -- those under 12 -- are still permitted to ride an ATV. Although paragraph P of the Decree reserves the CPSC's right to proceed separately under the Federal Hazardous Substances Act against ATVs which are marketed for children under the age of 12, Amici believe that this Decree should deal directly with and should resolve the problem acknowledged in the Complaint. Thus, all child-sized ATVs should be banned immediately and sales to or for the use of children under the age of 16 should be halted.

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[3] See for instance the "Report of the CPSC All-Terrain Vehicle (ATV) Task Force: Regulatory Options for All-Terrain Vehicles" cleared for release September 30, 1986 (hereinafter referred to as "CPSC Task Force Report"), pages 10-11, 76, 80-86, and 110.

[4] *See*, Exhibit 1, attached hereto, which is a memorandum from Leonard Schachter, EPHA, staff member of the Consumer Product Safety Commission to the Commission and others, under date of November 10, 1987; the attachments are not included because of length, but are available if the Court desires.

D. Amici's Suggestions.

Amici believe that both reason and injury and death data lead to the conclusion that all child-size ATVs -- ATVs which can be operated by children under 16 years of age -- and all three wheel ATVs should be banned permanently and immediately. Amici agree with the CPSC, and on their own have also concluded that current three wheel ATVs have design defects which render them imminently and unreasonably hazardous consumer products. Accordingly, Amici believe the Decree should require an immediate ban on the sale of all such ATVs. Such a ban would insure that dealers will sell back to defendant manufacturers three wheel ATVs currently in their stocks, thus making paragraph F2 of the Decree effective.

Amici are cognizant of the CPSC plan to develop performance standards for future ATVs -- both three and four wheel ATVs -- and applaud this effort. 'See, however, section VI, infra. While uncertain that such standards can be developed which will render a three wheel ATV safe, Amici are willing to "wait and see" if the Final Order sets a time limit for the adoption of a performance standard. But even if such standards are developed, they should not be applied to child-sized ATVs. Child-sized ATVs should be permanently banned -- period.

Even experienced riders can lose control of ATVs in turns or uphill climbs, or when encountering changes in terrain. Although no amount of training and experience can protect the rider from the inherent dangers involved in operating a current ATV, ATV control problems are most acute for untrained and inexperienced riders -- children under 16 being the most untrained and inexperienced. Amici do not believe that any changes will render ATVs safe for children because of the basic characteristics of ATVs and children.

The safety problems are compounded by the fact that ATVs have been promoted as solid, stable and easy-to-operate vehicles -- that "ATVing" is something the whole family can do together. The ATV's configuration and the large tires create the illusion of stability, and provide no hint of the difficult and complex reactions required to control the ATV. Because of all these problems with ATVs, Amici would urge that the CPSC and this Court use their authority to ensure that ATV sales to children under the age of 16 be banned outright, now and forever. To insure that such a ban is effective, the Final Order should not only require defendant manufacturers to repurchase all new and used child-size ATVs currently in the retail distribution chain, but also require them to offer to repurchase such child-sized ATVs from previous retail purchasers of them. (See, infra, § V.B, for a discussion of purchasers' rights to refunds.)

In order to effectuate the proper protection of our children, Amici believe that any Final Decree should set forth the following:

1. A ban on the sale of all child-size ATVs;

2. Defendants agree to no longer manufacture ATVs which have engine sizes of less than 90 cubic centimeter displacement ("ccd");

3. Defendants agree not to ship to any dealer or distributor any ATVs currently in their warehouse stock which have engine sizes of less than 90 ccd;

4. Defendants agree and undertake: (a) to send to each retail dealer, agent or representative of defendants who sells ATVs a notification: (1) informing them to immediately halt all marketing and sales of all ATVs which have an engine size of 90 ccd or less, and (2) offering to repurchase for a commercially reasonable cash amount, but in no case less than the dealer, agent or representative paid the defendant for said ATV, or to provide credit or other commercially reasonable adjustment for, all such ATVs in the possession or control of such retail dealer, agent or representatives which are returned to the manufacturer; and (b) to use such other best efforts as are necessary to ensure that their retail dealers,

agents or representatives will not sell ATVs which have an engine size of 90 ccd or less; and

5. Defendants agree to use their best efforts to ensure that their retail dealers, agents or representatives will not knowingly sell an ATV which has an engine size of greater than 90 ccd for use by a minor under the age of 16.

The addition of such language to any Final Order will save the lives and limbs of an untold number of children, spare their families from the anguish associated with such death and injury, and effectuate the policy Congress intended when it adopted the Consumer Product Safety Act.

III

ADVERTISING AND POINT-OF-SALE PROHIBITIONS AND REQUIREMENTS.

A. Media Advertising.

The market for ATVs is created through the advertisements defendants use. These advertisements show the fun and exhilaration of riding "free" over all types of terrain and environs -- exploring deserts, sand dunes and mountainous back country, fording streams and finding otherwise inaccessible fishing holes in the woods.

From the outset, the industry has advertised and marketed ATVs as All terrain vehicles, showing riders of all ages performing daring feats in apparent perfect safety. The states believe that the advertising campaigns of the various manufacturers have falsely represented the characteristics of

ATVs, with the direct result that misinformed consumers have bought ATVs by the hundreds of thousands, believing them tc be a safe, reliable, and fun method of transportation.[5]

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[5] It is interesting to note that a number of states have statutes which serially set out "unfair or deceptive acts or practices" which when undertaken in a transaction intended to result or which results in the sale or lease of goods or services are declared to be "unlawful." (See, e.g., statutes cited in fn. 1 for Connecticut, Illinois, Michigan, Minnesota, Tennessee, Texas and Wisconsin.)

California's statute, contained in its Consumer Legal Remedies Act (Cal. Civ. Code, § 1750 et seq.) sets forth some of these unfair or deceptive practices" as:

> "1770.
>
> "(e) Representing that goods or services have . . . characteristics, . . . uses, [or] benefits, . . . which they do not have . . . .
>
> "(g) Representing that goods or services are of a particular standard, quality, or grade, . . . if they are of another.
>
> "...
>
> "(i) Advertising goods or services with intent not to sell them as advertised.
>
> "...
>
> "(n) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not."

In the case of Outboard Marine Corp. v. Superior Court (Howarth, real party in interest) (1975) 52 Cal.App.3d 30, 124 Cal.Rptr. 673, the plaintiff sued Outboard Marine, the then manufacturer of an off-road vehicle known as the "Cushman Trackster," alleging that he and others had been deceived by false representations into buying the vehicle through representations and advertisements which included the following claims:

> "...
>
> "(3) Literally makes the impassable possible;
>
> "...

ATVs are not safe. They are not reliable. They are not "fun" toys. They are in fact inherently dangerous vehicles which take a great deal of skill and knowledge to ride, and which can kill and maim even the most experienced rider.

Accordingly, Amici believe that the advertising of these machines must be substantially changed to insure that no one who buys or rides an ATV is deceived into believing that ATVs are anything other than dangerous machines, the riding of which carries with it the risk of serious injury or death. Amici support the Decree's provisions that the industry develop ATV advertising guidelines and engage in a corrective advertising campaign to alert consumers to the skills needed for, and the

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(Fn. 5 cont.)

> "(5) The vehicle runs smoothly over rocks, stones and rough places;
>
> "(6) 'The nature of an all-terrain vehicle is such that it is often driven into wild, hitherto inaccessible country . . . . Here it is at last--the most reliable all-terrain vehicle ever produced--the one that takes you in and brings you back!'"

The court held that plaintiff's claims that defendants had by their representations and advertisements failed to disclose and had suppressed " . . . the fact that the trackster was defectively designed; that petitioners knew the vehicle was unstable and would roll over forward on a downgrade and that its braking system was totally defective; . . .; and finally, although petitioners knew the trackster would not operate within 'its design criteria,' knew Howarth, as a purchaser, would attempt to operate the machine within its purported design capabilities," clearly fell within the "unfair and deceptive practices" prohibitions listed above. In sum, the court, at page 36, stated:

> "It is fundamental that every affirmative misrepresentation of fact works a concealment of the true fact."

potential hazards and risks associated with, ATV riding. To accomplish this, we recommend the following:

1. Amici's Suggestions for ATV Advertising Guidelines.

The guidelines contemplated by the Decree in paragraph J.2.a., are intended for future ATV image advertising. Image advertising includes the types of terrain on which ATVs are ridden, speeds at which they should be driven, ATV stability, the need for training, and appropriate ages of riders. The Decree calls for agreement of the plaintiff and defendants as to the "manner" of such advertisements. This Court must insure that any "agreement" reached between the plaintiff and defendants is in the public interest and spirit of the Final Order.

Amici suggest that the following basic precepts must be adopted for all ATV advertising -- all advertisements must only show an ATV's use in the most cautious circumstances. Further, advertisements should contain:

* NO pictures or description of riding which requires expert skills.
* NO pictures or descriptions of persons who are or appear to be under 16 years of age riding an ATV.
* NO representation that an ATV is easy to operate.
* NO pictures or descriptions of aggressive recreational behavior.
* NO pictures or descriptions of risk-related performance, such as driving in or through water, wheels leaving the ground, or any other stunt.
* NO representation or claim that an ATV is usable on all terrains.
* Pictures or descriptions showing riders wearing protective equipment required by law or recommended by

the industry, including but not limited to, helmets, eye protection, gloves, boots, and heavy clothing.

Beginning immediately, a warning of the risks of ATV use should be required to be included in all advertisements. The warning must be meaningful, substantial, clear and conspicuous. This will vary by advertising medium. At a minimum, all print and broadcast commercials should contain a warning such as that used in the "ATV Safety Alert" (attached to Decree, as Appendix A):

"AN ATV IS NOT A TOY AND MAY BE DANGEROUS TO OPERATE."

This statement, or a similar one, should be used in every commercial. In a television advertisement, the statement should be made both verbally and pictorially; the phrase should appear in a contrasting color to the rest of the advertisement, be of legible size and be on the screen for at least ten (10) seconds. It should not be contained only as a superimposed phrase which is visible for just a few seconds. In a nonpictorially represented broadcast advertisement, the statement should be made verbally at a speed which is understandable to the listener.

Print advertisements should also contain the above warning language as well as more detailed warnings. Print lends itself to more detailed information about the risks of ATVs, and that opportunity must be taken.

2. Amici's Suggestions for the Public Awareness Advertising Campaign.

Paragraph J.2.b. of the Decree provides that defendants are to develop:

> " . . . a substantial public awareness campaign which shall consist of print advertisements and commercials (radio and television) dealing with the potential hazards and risks associated with ATVs."

Unlike the future advertising guideline provision of paragraph J.2.a., it does not even appear that under paragraph J.2.b. defendants need reach agreement with plaintiff as to the manner such corrective advertising is to take. Thus, it is of utmost importance that the Final Order and this Court deal with the content, effectiveness, and manner of the advertisements and commercials to be used by defendants in their "public awareness campaign."

This campaign is required to address "the potential hazards and risks associated with ATVs." Presumably, this is in recognition of the fact that past advertising has deceptively promoted ATVs as safe. The public awareness campaign must unqualifiedly tell consumers that an ATV is a dangerous machine. The warnings contained in the ATV Safety Alert (Decree, Appendix A) are a good starting point, but as indicated, infra, section IV, stronger statements must be emphasized in this campaign.

Care must be taken to insure that this campaign does not become an advertising "puff" piece for the industry or for ATVs. The sole message should be the potential risks and hazards of ATVs. The best way to see that this happens is to require a firm set of guidelines defendants must meet before defendants make such advertisements and air them to the public.

B. Point-of-Sale Notices and Warning Labels.

In the opinion of Amici, all potential purchasers must be adequately warned of the serious risk of death and injury associated with ATV use prior to any purchase of an ATV. At a minimum, these warnings and notices should be made through the use of labels, hang tags and Owner's Manuals. Further, the language used in these warnings must be much stronger than that employed in the past by the defendants.

1. Amici's Suggestions for Warning Labels.

The requirement that all ATVs have affixed to them a permanent warning label which will constantly remind the driver of an ATV of the dangerous nature of the vehicle he or she is using and the care which must be exercised in driving such a vehicle is of utmost importance. For this reason, the states endorse the language of the Decree (¶ H) requiring the industry to develop safety warning labels. Additionally, Amici believe the language in the Decree regarding format, location, durability, and readability of the labels (¶¶ H.3.a-d.) is acceptable.

Amici, however, are extremely concerned over the exact language to be used in the labels. (Decree, ¶ H.3.e. "content.") For example, we believe all labels should be captioned with an insignia such as the skull and crossbones or a large print phrase "DANGEROUS PRODUCT" or similar insignia or phrase which at a glance conveys the message that the ATV is a dangerous product and the driver thereof faces danger of injury and/or death when driving it. The skull and crossbones is such a universal symbol it is easily understood to convey this message. In addition, that insignia has been previously used on ATVs by at least one company that had been in the business of leasing ATVs to the general public.

The labels must at a minimum also contain in detail the warnings set forth in the Decree (at ¶ H.3.e.). It must be stressed, however, that in order for these warning labels to be effective, they must, in no uncertain terms, inform potential purchasers that ATVs are an extremely dangerous vehicle requiring special riding skills, and precautions which, if not followed, could likely lead to severe injury or death; and even if followed still present great danger to the driver.

2. Amici Suggestions for Hang Tags.

Amici believe that the language in the Decree requiring the industry to distribute vehicle hang tags for all ATVs is another adequate method, when combined with other methods, of warning consumers of the hazards associated with ATV use. The hang tags used by the industry in the past, however, have been wholly inadequate because they failed to adequately warn consumers of the risks associated with ATV use.

To be effective, the hang tags must contain all the warnings set forth on the vehicle warning labels (Decree, ¶ H.3) and the ATV Safety Verification Form. (Decree, ¶ I.2.b.(3) as modified per section IV, B, infra.) Amici suggest that a skull and crossbones insignia (or some other short but meaningful phrase or insignia) be used on all hang tags. Furthermore, the hang tag should be attached in some semi-permanent manner so that it can only be purposefully removed, as opposed to the strings which have been used in the past by the industry and can be easily removed before purchase. The hang tags must remain on all ATVs until removed by the purchaser.

3. Amici's Suggestions for the Owner's Manual.

In concept, Amici endorse the Decree's requirements for the Owner's Manual, paragraph I.2.a(1)-(3). As in the case with the hang tags used in the past, notices and warnings contained in current Owner's Manuals for ATVs have failed to warn consumers adequately of the risks and dangers associated with ATV use. The warnings set forth in the Decree, paragraph I.2.a(1), are a step in the right direction. The key to any warning, however, is the use of appropriate language. The language used in Owner's Manuals in the future cannot be nearly as soft as defendants have used in the past, but should effectively alert and caution consumers as to the dangers and hazards associated with ATV use.

In addition to the warnings already required by paragraph I.2.a.(1) of the Preliminary Consent Decree, the Owner's Manual must also include strict warnings prohibiting:

- Driving an ATV by anyone under the age of 16
- Aggressive recreational use including doing any wheelies, jumps or other stunts
- Operation of an ATV without first taking an approved safety course
- Using the ATV without use of adequate safety equipment

The Owner's Manuals must also affirmatively disclose that failure to follow all warnings and notices contained in the Owner's

Manual can cause the ATV to roll over, tip backwards, and/or lead to death or serious bodily injury.

Amici recognize that there is a limit to the number of warnings that may be included on labels and hang tags. This does not apply, however, to Owner's Manuals because they allow for detailed descriptions and explanations. Therefore, not only should the Owner's Manuals list the various warnings and notices, they should discuss in complete detail both why the warnings exist and what the consequences are for failing to follow the particular warnings or notices. One should not be able to purchase an ATV without first being aware of the warnings and notices in the Owner's Manual. Potential buyers should be encouraged to read the warnings and notices in the Owner's Manual before making the purchase of an ATV. Defendants should be required to devise a system for delivering this information from the Owner's Manual to the prospective purchaser prior to consummation of the ATV sale by defendants' retail dealers, agents or representatives.

As with our concerns over the development of the future advertising guidelines and the public awareness advertising campaign, Amici would request that the Final Order provide for specific guidelines and requirements to be met in the Owner's Manuals and a Court review of this agreed upon final form by plaintiff and defendants to insure compliance with the Final Order. Such a requirement in the Final Order can only increase the chances that the disclosures to be made will be accurate, meaningful, conspicuous and understandable. The need to disseminate the message of ATV danger and the need for care in the use of ATVs demands no less.

IV

THE "ATV SAFETY VERIFICATION FORM" MUST ADD TO CONSUMERS RIGHTS AND NOT DETRACT THEREFROM; THE "ATV SAFETY ALERT" LETTER SHOULD BE MODIFIED.

Amici applaud the sentiments behind the "ATV Safety Alert" program spelled out in paragraphs E.1.a., E.1.b, and Appendix A of the Decree, as well as those behind the requirement of an "ATV Safety Verification form" as set out in paragraph I.2.b.(3) of the Decree. While the goals behind both of these "notice" programs are laudable, we believe they are flawed in several respects.

A. The "ATV Safety Alert."

1. The Preliminary Consent Decree.

As set forth in paragraph E.1.a. of the Decree, defendants are to give mailed notice to all known prior purchasers of ATVs. This has already been done with the notice set forth in Appendix A.[6] This notice is intended to provide vital information to past purchasers of ATVs. The information provided sets forth facts relating to past death and injury statistics as well as information about how to use one's ATV in the future. The Decree, paragraph E.1.b. requires the same information to be contained in a four feet by four feet sign that defendants provide to their retail dealers, agents and representatives for posting in prominent places where ATVs are displayed, sold or offered for sale. The point-of-sale information provided prospective purchasers must be as effective as possible.

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[6] Paragraph E.1.a. of the Decree requires defendants to have accomplished this task within 20 days of this Court having signed the Preliminary Consent Decree, i.e., January 19, 1988.

2. Amici's Suggestions for the "ATV Safety Alert."

In order that the in store sign truly has the desired impact of lowering the staggering number of deaths and injuries which have occurred to ATV riders, the states urge the modification of the "ATV Safety Alert" sign, Appendix A of the Decree, along the following lines:

(1) Including following the third "bullet" of the first paragraph, a fourth bullet which reads as follows: "* * * According to the Consumer Product Safety Commission, over 330,000 ATV riders were injured between 1983 and 1987."

(2) Modification of the third and fourth bullets following "To Avoid Death or Severe Personal Injury," by deleting them and inserting in their place the following sentence: "NEVER ALLOW a child under 16 years old to drive or ride on an ATV."

(3) Modification of the sixth bullet following "To Avoid Death or Severe Personal Injury," to add at the end thereof the following sentence: "ATVs are not designed for two riders."

(4). Modification of the eighth bullet following "To Avoid Death or Severe Personal Injury," by deleting the word "public" from the first line thereof and adding after the word "vehicles" at the end of the first sentence the phrase: "or objects, due to the lack of maneuverability and tire traction on these surfaces."

(5) Modification of the tenth bullet following "To Avoid Death or Severe Personal Injury," by underlining the word "good" and deleting the "period" after the word "goggles" and the words "you should also wear," so that the sentence reads as follows: "Never drive an ATV without a good helmet and goggles, boots, gloves, heavy trousers, and a long-sleeve shirt."

(6) Modification of the eleventh bullet following "To Avoid Death or Severe Personal Injury," by adding a second

sentence thereto which reads as follows: "ATVs are dangerous at any speed and the danger increases with increased speed."

(7) Modification of the thirteenth bullet following "To Avoid Death or Severe Personal Injury," by adding a second sentence thereto which reads as follows: "Failure to follow procedures described in Owner's Manual may cause the ATV to roll over on the driver."

(8) Including a last bullet following "To Avoid Death or Severe Personal Injury," which reads as follows: "Following these warnings may decrease your chances of death or severe bodily injury, but do not guarantee that you can ride an ATV in safety."

These modifications are suggested by Amici in order to plug gaps in the "ATV Safety Alert" sign contemplated by the Decree.[7] Amici believe the form of the Alert as currently required by the Decree does not give sufficient use information to prospective consumers. For example, it instructs the purchaser not to drive an ATV at "excessive speeds," but that term is not defined. In fact, most ATVs do not even have speedometers. Further, consumers are not likely to be influenced by this statement since no product should be driven at excessive speeds. Thus, Amici suggest in (6) above that the purchaser should be informed that ATVs are dangerous at any speed and that the danger increases with increased speed. Likewise, Amici believe the other suggested modifications make each warning more meaningful and, therefore, more likely to be heeded.

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[7] While Amici would like to see a modified "Safety Alert" form, as required by paragraph E.1.a., sent again to each previous purchaser of an ATV, this may not be practical. Changing the "Safety Alert" signs which are to be posted at sales locations, however, should present no great problems.

The states believe one more modification should be made in the Safety Alert form. Amici see as one of the most glaring deficiencies of the current Alert its failure to adequately advise consumers that adherence to all of the warnings still will not eliminate the risk of death and serious injury associated with ATV use. We thus suggest the inclusion of an additional sentence to be added immediately preceding the, "For more information about ATV safety . . . ." sentence in the Alert. The added warning would read as follows: "Following all of the instructions and warnings on this ATV Safety Alert, in the Owner's Manual and on the warning label affixed to the ATV itself, will not eliminate the risk of death or serious injury associated with ATV use."

Amici have attached hereto as Exhibit 2, a copy of the "ATV Safety Alert" form modified as per our suggestions. We urge plaintiff, defendants and this Court to adopt this exhibit as a replacement Appendix to the Final Order. Adoption of the above suggested modifications will truly make the "ATV Safety Alert" what it purports to be.

B. The Safety Verification Form.

1. The Preliminary Consent Decree.

Paragraph I.2.b.(3) of the Decree requires defendants to distribute Safety Verification Forms to their retail dealers, agents and representatives. These forms, which are to be given to prospective ATV purchasers, are to contain "appropriate warnings regarding the operation of ATVs." As part of the Decree, defendants are "to use their best efforts" to see that their dealers, agents and representatives obtain signatures of the prospective ATV purchaser upon these Safety Verification Forms. Amici are very concerned both about the lack of specificity in the Decree regarding what is to be disclosed in the Safety Verification Form, and about an unintended mischief these forms could cause.

2. Amici's General Suggestions for the "Safety Verification Form."

A major defect of the portion of the Decree relating to the Safety Verification Form is that it may have the effect of allowing defendant manufacturers to avoid liability for sale of a defective product. The Decree and the Form itself should include a statement that the customer's signature on the Safety Verification Form or proof that the salesperson explained the information on the Safety Form does not constitute a waiver of liability or assumption of the risk of death or injury by an ATV purchaser who signs the Form. If it were to be otherwise, this Court and the plaintiff and defendants herein would in effect be telling prospective purchasers that in order to have truthful information about the product they are buying, they must waive common law and statutory rights given to purchasers of all other products.

Another defect in this portion of the Decree is that it does not set forth a requirement as to when the Safety Verification Form is to be read to and discussed with the purchaser. It would not appear to be a violation of the Decree if the defendant manufacturers ask their dealers to supply this information after the purchase has been completed. To be of any value, Amici believe the information must be read to prospective purchasers prior to any commitment to purchase by the consumer. The warnings should be given before the commitment and the consumer should be advised to read and think about the warnings and the dangers of ATV use before deciding whether or not to purchase the ATV. Since the Decree indicates the purchaser is to be provided a copy of the Safety Verification Form, Amici feel that to be truly meaningful, the form must be provided to the consumer at the time the consumer first expresses an interest in purchasing an ATV.

3. Amici's Specific Suggestions for the "Safety Verification Form."

An additional problem Amici have with this portion of the Decree is that it does not spell out what is to be included in the Safety Verification Form. If such a Form is to be used, the information given should be of significance. Amici would agree that the significant information and warnings the Decree requires defendants to give pursuant to the "ATV Safety Alert" (as modified per Amici's suggestions, supra) should be the basis of the Safety Verification Form.

The warnings which the Decree required the defendant manufacturers to supply to previous purchasers, are no less important, and arguably are more important, to prospective purchasers. The warnings to previous purchasers (contained in both the Decree's and Amici's modified ATV Safety Alert) include valuable numerical death and disability information and warnings about potential paralysis. Among other things, defendant manufacturers were required to disclose that:

- Over 900 people, including many children, have died in accidents associated with ATVs since 1982.
- Many people have become severely paralyzed or suffered internal injuries as a result of accidents associated with ATVs.
- Thousands of people have been treated in hospital emergency rooms every month for injuries received while riding an ATV.

Warnings to prospective purchasers should contain no less and the Final Order should spell this out in detail. Amici have attached hereto as Exhibit 3 a copy of the Safety Verification Form they suggest plaintiff and defendants and this Court adopt and attach to the Final Order as Appendix C. The "ATV Safety Alert" and the "Safety Verification Form" serve similar purposes and the Final Order should recognize this and require the use of similar disclosures in each.

V

DEFENDANTS SHOULD OFFER REFUNDS TO PRIOR ATV PURCHASERS.

As the Complaint and Decree herein make clear there is a need for the CPSC to correct a problem -- a problem caused by the defendants' prior advertising methods and defendants' prior failure to adequately disclose product characteristics and defects in ATVs to prospective purchasers.

A. The Preliminary Consent Decree Falls Short in Its Refund Offer.

Under the Consumer Product Safety Act, the CPSC has the direct authority to obtain refunds of the purchase price of a product. The current CPSC lawsuit is brought pursuant to section 12 of the CPSA on the ground that ATVs are an "imminently hazardous consumer product" -- one which "presents imminent and unreasonable risk of death, serious illness, or severe personal injury." In such a case, the CPSC may seek, among other things, an order of a refund for a product. In its Complaint, the CPSC does seek a consumer refund for all three wheel ATVs and all adult-sized four wheel ATVs purchased for use by children under 16 years of age.

Yet the Decree merely provides, in paragraph F.1. and F.2., that defendant manufacturers will halt marketing all three wheel ATVs and offer to repurchase new three wheel ATVs which their retail dealers, agents or representatives still have in stock. Thus, the Decree protects the retail seller of the three wheel ATV from economic loss, but it provides no protection -- against either physical or financial harm -- to the retail purchaser of three wheel ATVs. Many consumers purchased such vehicles during the past Christmas season, only to find five days later that they purchased for themselves or their children machines which are being classified by the CPSC as an "imminently hazardous consumer product" and which defendant manufacturers are now removing from the marketplace.

B. Amici Urge the Expansion of the Decree's Refund Policy.

Amici believe that the Decree must be modified in a number of particulars. First, defendants should be required to buy back from their retail dealers, agents and representatives used as well as new three wheel ATVs. The object is to remove these products from use, not allow them to continue being sold and used until they either are involved in an accident which damages them beyond repair or live out their expected life cycle. Requiring defendants to buy back new and used three wheelers in the retail distribution chain will curtail the number of these dangerous products in use.

Second, consumer refunds should be provided because this too would be an incentive to remove ATVs from use. With fewer ATVs in use, the number of deaths and injuries will be reduced. All purchasers should be entitled to return ATVs to the defendant manufacturers and their dealers for refunds. Refunds for purchasers of three wheel ATVs which are being taken off the market should be a "given," but refunds should also be available to any four wheel ATV purchaser who desires it.

Consumer refunds are warranted for a number of reasons. The manufacturers failed to disclose the hazards of ATVs and, in fact, affirmatively misrepresented the characteristics of ATVs. For example, ATVs were marketed as recreational vehicles for young children. In fact, as discussed supra, section II.B., ATVs pose a particular hazard to children under 16 who account for nearly half the ATV-related deaths.

Advertisements defendants have used show "fun" maneuvers of ATVs, such as jumps and riding at high speeds on rough terrains. In fact, such maneuvers are inherently dangerous and beyond the ordinary skills of most riders. Purchasers are now, under the terms of the Decree, to be warned against such maneuvers in future advertisements for ATVs, in point-of-sale labels and warnings and in the Owner's Manual. The "rules of the game" regarding the use of ATVs are being changed after the consumer purchased what turns out to be a grossly misrepresented product.

Consumers who purchased an ATV before the changed rules went into effect had no notice or inadequate notice of the risk of death and severe injury posed by ATVs. Had they known the risks, many consumers might not have bought them. Once they learn of the dangers through receipt of the "ATV Safety Alert" and other publicity, many consumers are likely to not use them again. The resale value of three wheel ATV models may be, and well should be, minimal; the resale value of four wheel models may likewise drop substantially. The retail consumer, who suffers the greatest risk of injury and death, should be allowed to recoup undeserved losses of this kind, no less than those in the retail distribution chain.

Furthermore, the defendant manufacturers have profited by their unfair and deceptive practices in marketing ATVs. They should not be permitted to retain profits obtained from a deceived public, and obtained from the sale of inherently dangerous products.

Amici contend that for the Congressional purposes behind the CPSA to be carried out as intended and for the CPSC to carry out its duty to the public as required by the Act, the Decree should be modified so that both consumers who desire to return their dangerous and no longer marketed three wheel ATVs, and consumers who bought four wheel ATVs under deceptive representations and without notice of the hazards associated with ATV usage, are entitled to a commercially reasonable cash refund upon return of their ATV to the retail dealer of the manufacturer from whom they purchased it.[8]

VI

THE DECREE SHOULD BE MODIFIED TO PROVIDE FOR THE ADOPTION OF AN ATV PERFORMANCE STANDARD.

Because of the disastrous effect the introduction of ATVs has had on the public in terms of death and injury, Amici believe that a performance standard, which all ATVs sold in the future must meet, should be adopted.

A. Analysis of Decree.

The Decree in paragraph L. includes a declaration that the CPSC has already commenced its rulemaking process for the establishment of a mandatory standard. It also provides that the ATV industry defendants will attempt in good faith to negotiate an agreement on voluntary standards within four months of the court's approval of a Final Decree. The Preliminary Decree in

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8. Most of the state laws under which the Amici Attorneys General would bring an action against the defendant manufacturers, provide that upon proof the defendants sold ATVs based upon deceptive or misleading advertising, the state courts would have the authority to order restitution or refunds to consumer purchasers. Further, some courts have held that even absent a specific grant of authority to order restitution, a state court in deciding a matter of deceptive practices is sitting as a court of equity, and inherent in the equity court's power, is the power to do equity, i.e., to take from the one engaging in deceptive practices his ill-gotten gain and order restitution be made to his victim. (*See*, *e.g.*, *People* v. *Superior Court (Jayhill, Real Party in Interest* (1973) 9 Cal.3d 283; 107 Cal.Rptr. 192.)

paragraph L.3. then specifically permits the reintroduction of three wheel ATVs in the event that those vehicles meet either the mandatory or voluntary standard, whichever is adopted.

Amici note two major problems with the Decree's provision on standards as set forth in paragraph L. First, the Decree refers only to "standards" and not to standards respecting performance requirements. Based on the Consumer Product Safety Act's definition of a "standard" (15 U.S.C. § 2056(a)), the requirement of this provision could be satisfied if the CPSC adopts a safety standard which requires ATVs to be marked with or accompanied by certain warnings or instructions, but does not include performance requirements.

Second, the Decree does not specifically declare that a mandatory standard (performance or other), will be promulgated by the CPSC if the parties fail to reach agreement on a voluntary standard four months from the date of the Final Decree. Thus, it appears that if the parties do not reach agreement, there may be no adoption of any standard by the CPSC, notwithstanding the fact that they may have commenced the rulemaking process. Amici believe the Decree should be modified to require the adoption of such a performance standard.

B. Amici Urge the Requirement of an ATV Performance Standard.

Amici's analyses of the CPSA indicates that once the CPSC has adopted a standard, individual states may be precluded from adopting their own standards under the Act's preemption provision (15 U.S.C. § 2075), unless the state standard adopted is identical to that of the CPSC. Because the states may be bound to accept any performance standard promulgated by the federal government, Amici believe that it is critical for the states to participate in the development of that standard.

The CPSC has already started work on an ATV performance standard. It has met and corresponded with representatives from the ATV industry. Under the Decree (paragraph L.2.), the CPSC is required to furnish the industry defendants a draft of the standard. Amici supports participation by the Attorneys General in the CPSC performance standard setting process and request the Decree be modified to provide that the states receive a draft of any proposed standard at the same time it is provided to defendant manufacturers.

C. Items to Be Included in a Performance Standard.

When developing an ATV performance standard, it is important to remember that current ATV design defects include lack of an adequate suspension system, lack of an effective rear-wheel differential suitable for variable terrain, a high center of gravity in relation to the dimensions of the vehicle, and tires which contribute to machine tipping. This combination of faulty design characteristics produces steering and balance problems which cause ATV riders to lose control of the vehicle. The most significant handling and control problems occur in turns and on slopes. In turning an ATV, the rider must shift his or her body weight to the outside of the turn, while at the same time leaning into the turn. In moving up a slope, the rider must keep his or her body weight forward over the ATV. During either a turn or a climb, a slight change in terrain, including a bump or a hole, can cause the ATV to flip over or roll over before the rider has an opportunity to respond and regain control. (See, CPSC Task Force Report, pp. 165-168, 193-199.)

Amici believe the only way to slow the onslaught of death and injury suffered by ATV riders, if the vehicles are not altogether banned, is to develop a performance standard which results in changes in design of currently or previously manufactured ATVs. As pointed out supra, section II.D., such performance standards for ATVs should clearly state they have applicability to adult-size vehicles only, since all child-size ATVs should be banned by any Final Order. The performance standard adopted must, at a minimum, address the following vehicle characteristics:

- Lateral stability
- Longitudinal stability
- Transient performance
- Braking performance
- Suspension performance
- Speed capability
- Tires

Amici believe it is an absolute necessity that an ATV mandatory performance standard be developed, with the assistance of Amici and other interested parties, and be implemented within one year.

CONCLUSION

In sum, Amici believe the Decree is headed in the right direction, but it has not yet reached its destination. When faced with a product that has led to so many deaths and injuries in such a short period of time, firm action, not the reaching of a gentleman's agreement, is called for on the part of the CPSC.

Thus Amici would call for the adoption of the Decree as a Final Order, with the following modifications:

1. All child-size ATVs are banned and sales of ATVs to or for the use of children under the age of 16 are prohibited;
2. A meaningful ATV performance standard is required to be adopted within one year from the adoption of the Final Order;
3. Prior consumer purchasers of any ATV are offered a commercially reasonable cash refund by defendant manufacturers;
4. More stringent requirements are placed on future media advertising, the public awareness advertising campaign and point-of-sale notices, warning labels and Owner's Manuals; and
5. The "ATV Safety Alert" form and the "ATV Safety Verification Form" are modified along the lines suggested by Amici and the Verification Form gives potential buyers needed information but takes no rights away from them.

Such a Final Order will serve the safety interests of the American public, the interests Congress sought to protect by the adoption of the Consumer Product Safety Act and the interests the Consumer Product Safety Commission is charged with protecting. It will also obviate the need for the various state Attorneys General to bring a multitude of separate actions on behalf of the citizens of their states.

DATED: February 8, 1988

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UNITED STATES GOVERNMENT
MEMORANDUM

U.S. CONSUMER PRODUCT
SAFETY COMMISSION
WASHINGTON, D.C. 20207

RECEIVED-OFFICE

NOV 10 1987

TO : The Commission
Through: Sadye E. Dunn, Director, Office of the Secretary SDunn
Through: James Lacy, General Counsel
Through: Leonard DeFiore, Executive Director
Through: Nicholas Marchica, EX-P NVM
Through: Dr. Robert D. Verhalen, AED, Epidemiology

FROM : Leonard Schachter, EPHA Lea

SUBJECT: Update of ATV Deaths and Injuries

Deaths Reported to the Commission

On September 4, 1987, the Commission had reports of 883 ATV related deaths which occurred between 1982 and 1987. As shown in the table below, the reported deaths increased by 94 since the June 3, 1987 tabulation (Memorandum dated August 11, 1987).

	Number Of Deaths Reported		
Year	(9/4/87)	(6/3/87)	(Difference)
Total	883	789	94
1987	105	33	72
1986	268	254	14
1985	245	245	--
1984	153	146	7
1983	85	84	1
1982	25	25	--

Four wheeled ATVs were reported in 45 percent of the fatal accidents in 1987, in 26 percent of the fatal accidents in 1986, in 19 percent of the fatal accidents in 1985, and in 5 percent of the fatal accidents in prior years.

CPSA 6(b)(1) Cleared 11/10/87
___ No Mfrs/Prvtlbrs or
Products Identified
X Excepted by
___ Firms Notified,
Comments Processed.

NOTE: This document has not been reviewed or accepted by the Commission.
Initial ______ Date 11/10/87

EXHIBIT 1

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Attached are lists of ATV deaths by state (Attachment I) and year of death in reverse chronological order (Attachment II). The highest number of incidents were reported in California (57), New York (59), Michigan (46), Wisconsin (45), Pennsylvania (44), and Arkansas (39).

A review of the fatalities indicated that 377 victims were under 15 years of age (43 percent) and 169 victims were under 12 years of age (19 percent).

Estimated Hospital Emergency-Room Treated Injuries (NEISS)

The following are estimates 1/ of ATV related injuries treated in hospital emergency rooms nationwide between 1982 and 1986:

Year	Adjusted Annual Estimate
1982	8,600
1983	26,900
1984	63,900
1985	85,900
1986	86,400

Between January 1 and September 30, 1987, an estimated 63,600 ATV related injuries were treated in hospital emergency rooms nationwide. The estimate of ATV related injuries for the same time period in 1986 was 72,250. The difference in the January-September estimates is not statistically significant.

1/ The adjusted annual estimates were based on the 93 percent adjustment factor from the Survey of All Terrain Vehicle Related Injuries (May 1 to July 15, 1985), on revisions to the NEISS Coding Manual in March 1985, and on review of NEISS comments to exclude Dune Buggies and identify ATVs classified as Minibikes or Trail Bikes.

Attachments

APPENDIX A

[Sign at Point of Sale]

ATV SAFETY ALERT

The Consumer Product Safety Commission has concluded that ALL TERRAIN VEHICLES (ATVs) may present a risk of DEATH or SEVERE INJURY in certain circumstances. While accidents may occur for many reasons:

*** Over 900 people, including many children, have died in accidents associated with ATVs since 1982.

*** Many people have become severely paralyzed or suffered sever internal injuries as a result of accidents associated with ATVs.

*** Thousands of people have been treated in hospital emergency rooms every month for injuries received while riding an ATV.

*** According to the Consumer Product Safety Commission, over 330,000 ATV riders were injured between 1983 and 1987.

Because of this, the United States Government has filed a lawsuit against all manufacturers and distributors of ATVs asking the Court to declare that ATVs are hazardous and to order the manufacturers and distributors to take actions to protect ATV riders. The distributors, while contesting the validity of the allegations made by the government, are presently engaged in discussions with the government to resolve these issues without litigation.

You should be aware that an ATV IS NOT A TOY AND MAY BE DANGEROUS TO OPERATE. An ATV handles differently from other vehicles, including motorcycles and cars. According to the Consumer Product Safety Commission, an ATV can roll over on the rider or violently throw the rider without warning, and even hitting a small rock, bump, or hole at low speed can upset the ATV.

TO AVOID DEATH OR SEVERE PERSONAL INJURY

- NEVER ATTEMPT TO DRIVE AN ATV WITHOUT PROPER INSTRUCTION. TAKE A TRAINING COURSE. BEGINNING DRIVERS SHOULD RECEIVE TRAINING FROM A CERTIFIED INSTRUCTOR. You can call 1-800-447-4700 to find out about training courses nearest me.

- NEVER LEND YOUR ATV TO ANYONE WHO HAS NOT TAKEN A TRAINING COURSE OR HAS NOT BEEN DRIVING AN ATV FOR AT LEAST A YEAR.

EXHIBIT 2

- NEVER ALLOW A CHILD UNDER 16 YEARS OLD TO DRIVE OR RIDE ON AN ATV.
- NEVER DRIVE AN ATV AFTER CONSUMING ALCOHOL OR DRUGS.
- NEVER CARRY A PASSENGER ON AN ATV. CARRYING A PASSENGER MAY UPSET THE BALANCE OF THE ATV AND MAY CAUSE IT TO GO OUT OF CONTROL. ATVs ARE NOT DESIGNED FOR TWO RIDERS.
- NEVER DRIVE AN ATV ON PAVEMENT. THE VEHICLE IS NOT DESIGNED TO BE USED ON PAVED SURFACES AND THE ATV MAY BE DIFFICULT TO CONTROL.
- NEVER DRIVE AN ATV ON A ROAD, EVEN A DIRT OR GRAVEL ONE, BECAUSE YOU MAY NOT BE ABLE TO AVOID COLLIDING WITH OTHER VEHICLES OR OBJECTS DUE TO THE LACK OF MANEUVERABILITY AND TIRE TRACTION ON THESE SURFACES. ALSO, DRIVING ON SOME ROADS WITH AN ATV MAY BE AGAINST THE LAW.
- NEVER ATTEMPT TO DO "WHEELIES", JUMPS, OR OTHER STUNTS.
- NEVER DRIVE AN ATV WITHOUT A GOOD HELMET AND GOGGLES, BOOTS, GLOVES, HEAVY TROUSERS, AND A LONG SLEEVE SHIRT.
- NEVER DRIVE AN ATV AT EXCESSIVE SPEEDS. ATVs ARE DANGEROUS AT ANY SPEED AND THE DANGER INCREASES WITH INCREASED SPEED.
- ALWAYS BE EXTREMELY CAREFUL WHEN DRIVING AN ATV, ESPECIALLY WHEN APPROACHING HILLS, TURNS, AND OBSTACLES, AND WHEN DRIVING ON UNFAMILIAR OR ROUGH TERRAIN. FAILURE TO FOLLOW PROCEDURES DESCRIBED IN OWNER'S MANUAL MAY CAUSE THE ATV TO ROLL OVER ON THE DRIVER.
- FOLLOWING THESE WARNINGS MAY DECREASE YOUR CHANCES OF DEATH OR SEVERE BODILY INJURY, BUT DO NOT GUARANTEE THAT YOU CAN RIDE AN ATV IN SAFETY.

FOLLOWING ALL OF THE INSTRUCTIONS AND WARNINGS ON THIS ATV SAFETY ALERT, IN THE OWNER'S MANUAL AND ON THE WARNING LABEL AFFIXED TO THE ATV ITSELF, WILL NOT ELIMINATE THE RISK OF DEATH OR SERIOUS INJURY ASSOCIATED WITH ATV USE.

FOR MORE INFORMATION ABOUT ATV SAFETY, CALL THE CONSUMER PRODUCT SAFETY COMMISSION AT 1-800-638-2772, OR THE ATV DISTRIBUTORS' SAFETY HOTLINE AT 1-800-447-4700.

APPENDIX C

ATV SAFETY VERIFICATION FORM

AN ATV IS NOT A TOY AND MAY BE DANGEROUS TO OPERATE.

This form contains vital safety information. Your dealer will review the warnings with you and ask you to verify that you have read and understood each warning by placing your initials on the line beside it. DO NOT SIGN AND ACKNOWLEDGE THIS FORM WITHOUT SERIOUSLY CONSIDERING THE POTENTIALLY LIFE THREATENING IMPLICATIONS OF OWNING AND RIDING AN ATV.

___ An ATV handles differently from other vehicles, including motorcycles and cars. According to the Consumer Product Safety Commission an ATV can roll over on the rider or violently throw the rider without warning and even hitting a small rock, bump, or hole at low speed can upset the ATV.

___ ATVs may present a risk of DEATH or SEVERE INJURY in certain circumstances. Over 900 people, approximately half children and half adults, have died in accidents associated with ATVs since 1982. Many people have become totally paralyzed or suffered severe and debilitating internal injuries as a result of accidents associated with ATVs. Every month thousands of people have been treated in hospital emergency rooms for injuries received while riding an ATV. According to the Consumer Product Safety Commission, over 330,000 ATV riders were injured between 1983 and 1987.

****

Failure to heed these warnings could result in DEATH OR SEVERE PERSONAL INJURY

****

I understand that I must:

___ NEVER ALLOW A CHILD UNDER 16 YEARS OLD TO DRIVE OR RIDE ON THIS ATV.

___ NEVER ATTEMPT TO DRIVE AN ATV WITHOUT PROPER INSTRUCTION. TAKE A TRAINING COURSE. BEGINNING DRIVERS SHOULD RECEIVE TRAINING FROM A CERTIFIED INSTRUCTOR. I can call 1-800-447-4700 to find out about training courses nearest me.

___ NEVER ATTEMPT TO DRIVE AN ATV UNTIL I HAVE READ THE OWNER'S MANUAL.

___ NEVER LEND MY ATV TO ANYONE WHO HAS NOT TAKEN A TRAINING COURSE OR HAS NOT BEEN DRIVING AN ATV FOR AT LEAST A YEAR.

___ NEVER DRIVE AN ATV AFTER CONSUMING ALCOHOL OR DRUGS.

EXHIBIT 3

___ NEVER CARRY A PASSENGER ON AN ATV. CARRYING A PASSENGER MAY UPSET THE BALANCE OF THE ATV AND MAY CAUSE IT TO GO OUT OF CONTROL. ATVs ARE NOT DESIGNED FOR TWO RIDERS.

___ NEVER DRIVE AN ATV ON PAVEMENT. THE VEHICLE IS NOT DESIGNED TO BE USED ON PAVED SURFACES AND THE ATV MAY BE DIFFICULT TO CONTROL.

___ NEVER DRIVE AN ATV ON A ROAD, EVEN A DIRT OR GRAVEL ONE, BECAUSE I MAY NOT BE ABLE TO AVOID COLLIDING WITH OTHER VEHICLES OR OBJECTS DUE TO THE LACK OF MANEUVERABILITY AND TIRE TRACTION ON THESE SURFACES. ALSO, DRIVING ON SOME ROADS WITH AN ATV MAY BE AGAINST THE LAW.

___ NEVER ATTEMPT TO DO "WHEELIES", JUMPS, OR OTHER STUNTS.

___ NEVER DRIVE AN ATV WITHOUT A GOOD HELMET AND GOGGLES, BOOTS, GLOVES, HEAVY TROUSERS, AND A LONG SLEEVE SHIRT.

___ NEVER DRIVE AN ATV AT EXCESSIVE SPEEDS. ATVs ARE DANGEROUS AT ANY SPEED AND THE DANGER INCREASES WITH INCREASED SPEED.

___ ALWAYS BE EXTREMELY CAREFUL WHEN DRIVING AN ATV, ESPECIALLY WHEN APPROACHING HILLS, TURNS, AND OBSTACLES, AND WHEN DRIVING ON UNFAMILIAR OR ROUGH TERRAIN. FAILURE TO FOLLOW PROCEDURES DESCRIBED IN OWNER'S MANUAL MAY CAUSE THE ATV TO ROLL OVER ON THE DRIVER.

I understand all of the above warnings and that failure to obey these warnings could result in death or severe bodily injury. Following these warnings may decrease my chances of death or severe bodily injury, but do not guarantee that I can ride an ATV in safety. By signing this form, initialling the warnings, and having the salesperson whose name appears below explain the verification material to me, I neither intend to waive any right I may have in the future to bring any action of any type whatsoever against the manufacturer of the ATV I purchase, or any other party involved with the development, production, marketing or selling of said ATV, nor do I take on any assumption of risk of death or injury due to a product defect in the ATV.

____
Customer's Signature Date

____
Customer's Name (printed)

____

____
Customer's Address

I have explained the foregoing warnings to the above signed customer. I have provided the customer with a signed copy of this form. To the best of my knowledge, I have sold the customer an appropriately sized vehicle.

____
Dealer's Signature Date

____
Dealer's Name (printed)

____

____
Dealer's Address

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES,)
)
Plaintiff,)
) Civ. Action No. 87-3525 (SS)
v.) (Sporkin, J.)
)
AMERICAN HONDA MOTOR CO.,)
INC., ET AL.,)
)
Defendants.)

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 1988, I mailed a copy of the attached Amici Curiae Brief of the various states to:

Stephen E. Hart
Department of Justice
9th and Pennsylvania Ave., N.W.
Washington, D.C. 20530
(Attorney for Plaintiff)

William H. Barringer
Willkie, Farr & Gallaher
11th Floor
818 Connecticut Ave., N.W.
Washington, D.C. 20006
(Attorney for Defendant
Yamaha Motor Corp.)

Mark L. Gerchick
Paul, Hastings, Janofsky
& Walker
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(Attorney for Defendant
Kawasaki Motors Corp.)

Katherine A. Meyer
Public Citizen Litigation
Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(Attorney for Applicants
for Intervention)

Howard P. Willens
Wilmer, Cutler &
Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(Attorney for Defendant
American Honda Motor Co.)

Harry W. Cladouhos
Pettit & Martin
Suite 600
1800 Mass. Ave., N.W.
Washington, D.C. 20036
(Attorney for Defendant
Suzuki Motor Corp.)

David Bieging
Robins, Zell, Larson
& Kaplan
1627 I Street, N.W.
Suite 610
Washington, D.C. 20006
(Attorney for Defendant
Polaris Indus.)

JOHN K. VAN DE KAMP, Attorney General
of the State of California
HERSCHEL T. ELKINS,
Senior Assistant Attorney General

By:
ALBERT NORMAN SHELDEN,
Supervising Deputy Attorney General
110 West A Street, Suite 700
San Diego, CA 92101
(619) 237-7754

Attorneys for Amici Curiae

APPENDIX 2.—LETTER DATED JANUARY 26, 1988, TO CHAIRMAN TERRENCE SCANLON, CPSC, FROM MEMBERS OF CONGRESS

Congreſs of the United States
Washington, DC 20515

January 26, 1988

Chairman Terrence Scanlon
Commissioner Anne Graham
Commissiòner Carol G. Dawson
U.S. Consumer Product Safety Commission
Washington, D.C. 20207

Dear Chairman & Commissioners:

We write to enlist our support for the preliminary consent decree which was agreed upon on December 29, 1987, between the Consumer Product Safety Commission, the Department of Justice, and the distributors of all-terrain vehicles (ATV's). The proposed agreement is an effective and comprehensive settlement which we believe will serve to protect the consumer.

Opponents of the preliminary consent decree believe that the consumer, who allegedly purchased ATV's without full knowledge of the risk of injury, should have the option of a refund. Although this refund is not included in the proposed agreement, the Commission has the right to pursue the refund program if it finds that the proposed resolutions are not effective in reducing accidents. We note, however, that there has been a dramatic decline in the fatality and injury rates over the past year. The education and training programs required by this consent decree, coupled with the current trend, will hopefully make the need for a future refund program less likely. In addition, a consumers right to seek recourse through the courts is not affected by this settlement. We believe this to be a fair and balanced approach.

It is most important that immediate action in the form of a vigorous public awareness campaign to protect the consumer from unnecessary risk of death and injury will be accomplished by this agreement and for this reason we support a consent decree over the alternative of costly litigation which could take years to resolve and offers an uncertain outcome.

We are pleased that the Consumer Product Safety Commission, the Department of Justice and the distributors of ATV's are committed to working together on a comprehensive approach to enhancing ATV operator safety.

Sincerely,

Larry E Craig
Larry Craig, M.C.

Bill Dannemeyer
William E. Dannemeyer, M.C.

Amo Houghton

James M. Inhofe, M.C.

Amo Houghton, M.C.

Mike Oxley, M.C.

APPENDIX 3.—ADDITIONAL COMMENTS FROM DR. RICHARD M. NARKEWICZ

DOUG BARNARD, JR., GEORGIA, CHAIRMAN
JOHN M. SPRATT, JR., SOUTH CAROLINA
JOE KOLTER, PENNSYLVANIA
BEN ERDREICH, ALABAMA
ALBERT G. BUSTAMANTE, TEXAS
MATTHEW G. MARTINEZ, CALIFORNIA

ONE HUNDREDTH CONGRESS
Congress of the United States
House of Representatives
COMMERCE, CONSUMER, AND MONETARY AFFAIRS SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-377
WASHINGTON, DC 20515

LARRY E. CRAIG, IDAHO
JAMES M. INHOFE, OKLAHOMA
AMORY HOUGHTON, JR., NEW YORK
CHRISTOPHER SHAYS, CONNECTICUT

MAJORITY—(202) 225-4407

February 19, 1988

Dr. Richard M. Narkewicz
President
American Academy of Pediatrics
P. O. Box 927
Elk Grove Village, IL 60009-0927

Dear Dr. Narkewicz:

Thank you for your recent letter concerning the hazards of ATVs and your testimony before our subcommittee concerning this matter.

We greatly appreciate your taking the time to supply us with the benefit of your experience and insight. Your letter, as well as your testimony, will be included in the permanent printed record of the hearing.

Thank you again.

Sincerely,

Doug Barnard Jr.

Doug Barnard, Jr.
Chairman

DB:tjj:f

American
Academy of
Pediatrics

141 Northwest Point Blvd.
P.O. Box 927
Elk Grove Village, IL 60009-0927
Phone (312) 228-5005

Reply to:
Richard M. Narkewicz, M.D.
Timber Lane Medical Center
81 Timber Lane
South Burlington, VT 05403
(802) 864-6475

President
Richard M. Narkewicz, M.D.

Vice President
Donald W. Schiff, M.D.

Past President
William C. Montgomery, M.D.

Executive Director
James E. Strain, M.D.

Executive Board

Maurice E. Keenan, M.D.
West Newton, Massachusetts

David Annunziato, M.D.
East Meadow, New York

Arthur Maron, M.D.
W. Orange, New Jersey

Robert Grayson, M.D.
Surfside, Florida

Leonard P. Rome, M.D.
Shaker Heights, Ohio

Kenneth O. Johnson, M.D.
Milwaukee, Wisconsin

Betty A. Lowe, M.D.
Little Rock, Arkansas

George D. Comerci, M.D.
Tucson, Arizona

Birt Harvey, M.D.
Palo Alto, California

February 1, 1988

RECEIVED
FEB 10 1988
COMMERCE, CONSUMER AND
MONETARY AFFAIRS SUBCOMMITTEE

FEB 08 1988

The Honorable Doug Barnard, Jr.
Congress of the United States
House of Representatives
Rayburn House Office Bldg, Rm B-377
Washington, D.C. 20515

Dear Chairman Barnard:

Thank you for the opportunity to testify on behalf of the American Academy of Pediatrics in regard to ATV safety for children.

I thought that the hearing was most productive and I compliment you on your organization and attention to detail. I hope it was clear from the various testimonies that children under 16 lack the coordination, balance reflexes, perception and maturity of judgement to operate either three wheeled or four wheeled ATV's safely. Thus the only solution to the problems posed by the physical limitations of the machine and the driver must be to take these dangerous vehicles out of the hands of children under 16, that is to say ban the sales and use of either three or four wheeled ATV's under 16 and institute some sort of a recall and rebate system to take out of circulation the vehicles that were marketed and sold to an unsuspecting parent or child. The Academy of Pediatrics greatly appreciates the opportunity to testify on behalf of children and we promise you our support in pursuing the elimination of this most serious new product-related hazard to the health and well being of the American children.

Sincerely,

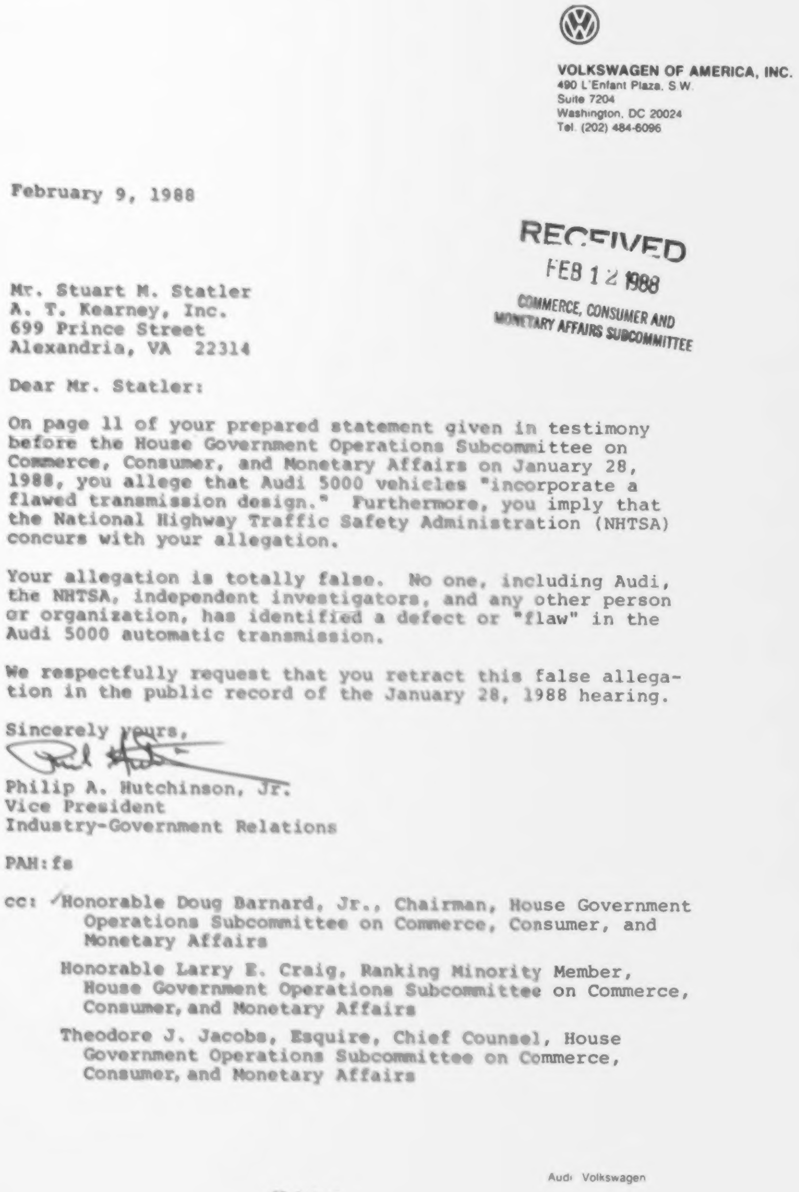
RM Narkewicz, M.D.

Richard M. Narkewicz, M.D.
President

cc: Donald W. Schiff, M.D.
James E. Strain, M.D.
Mark Widome, M.D.
Elizabeth J. Noyes

RMN:dkg

APPENDIX 4.—LETTER DATED FEBRUARY 9, 1988 TO MR. STUART M. STATLER FROM VOLKSWAGEN OF AMERICA, INC., AND REPLY FROM MR. STATLER



VOLKSWAGEN OF AMERICA, INC.
490 L'Enfant Plaza, S.W.
Suite 7204
Washington, DC 20024
Tel. (202) 484-6096

February 9, 1988

RECEIVED
FEB 12 1988
COMMERCE, CONSUMER AND
MONETARY AFFAIRS SUBCOMMITTEE

Mr. Stuart M. Statler
A. T. Kearney, Inc.
699 Prince Street
Alexandria, VA 22314

Dear Mr. Statler:

On page 11 of your prepared statement given in testimony before the House Government Operations Subcommittee on Commerce, Consumer, and Monetary Affairs on January 28, 1988, you allege that Audi 5000 vehicles "incorporate a flawed transmission design." Furthermore, you imply that the National Highway Traffic Safety Administration (NHTSA) concurs with your allegation.

Your allegation is totally false. No one, including Audi, the NHTSA, independent investigators, and any other person or organization, has identified a defect or "flaw" in the Audi 5000 automatic transmission.

We respectfully request that you retract this false allegation in the public record of the January 28, 1988 hearing.

Sincerely yours,

Phil Hut

Philip A. Hutchinson, Jr.
Vice President
Industry-Government Relations

PAH:fs

cc: ✓Honorable Doug Barnard, Jr., Chairman, House Government Operations Subcommittee on Commerce, Consumer, and Monetary Affairs

Honorable Larry E. Craig, Ranking Minority Member, House Government Operations Subcommittee on Commerce, Consumer, and Monetary Affairs

Theodore J. Jacobs, Esquire, Chief Counsel, House Government Operations Subcommittee on Commerce, Consumer, and Monetary Affairs

Audi Volkswagen

A.T. Kearney, Inc.
699 Prince Street
P.O. Box 1405
Alexandria, Virginia 22313
703 836 6210

Management
Consultants

COPY

February 10, 1988

ATKEARNEY

Mr. Philip A. Hutchinson, Jr.
Vice President
Industry-Government Relations
Volkswagen of America, Inc.
490 L'Enfant Plaza, S.W.
Suite 7204
Washington, D.C. 20024

Dear Mr. Hutchinson:

Thank you for your letter of February 9, relating to my testimony before the House Subcommittee on Commerce, Consumer and Monetary Affairs on January 28, 1988. It was my impression that my reference to the sudden acceleration problem associated with certain Audi 5000 vehicles with automatic transmission was a matter of public record. From news reports, I was led to believe that Volkswagen/Audi, to its credit, had acknowledged the existence of a problem, notified previous owners, and instituted corrective measures to avert any further incidents.

If I am incorrect, could you kindly furnish me with information on the actions Volkswagen of America Inc., has taken in this regard, together with whatever explanation has been offered by your firm to its customers and to the relevant government agency, the National Highway Traffic Safety Administration, as to why sudden acceleration has been experienced with respect to these Audi 5000 vehicles.

Upon receipt of that explanation, I will be pleased to make such further submission to the Committee as is appropriate to assure a fair and accurate public record in this matter.

Sincerely,

Stuart M. Statler
Vice President

Appendix 5.—Letter Dated February 19, 1988 From Commissioner Anne Graham Concerning Anne Settle's Petition To Recall Three-Wheel ATV's

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

RECEIVED
FEB 2[illegible] 1988
COMMERCE, CONSUMER AND
MONETARY AFFAIRS SUBCOMMITTEE

February 19, 1988

Mr. Theodore J. Jacobs
Chief Counsel
Subcommittee on Commerce, Consumer and Monetary Affairs
House Committee on Government Operation
B-377 Rayburn
Washington, D.C. 20515-6144

Dear Mr. Jacobs:

Enclosed is a copy of the petition, signed by over 900 people, requesting the recall of three-wheel ATVs. Congressman Barnard has graciously consented to Commissioner Graham's request that this document be placed in the Congressional Record.

Thank you for your courtesy in attending to this matter.

Sincerely,

Margaret S. Whitehead

Margaret S. Whitehead
Staff Assistant to
Anne Graham, Commissioner

Enclosure: Anne Settle's petition to recall 3-Wheel ATVs

MSW:self

List contained in Subcommittee files

APPENDIX 6.—JUSTICE DEPARTMENT PRESS RELEASE, DECEMBER 30, 1987

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, DECEMBER 30, 1987

CIV
202-633-2018

The Department of Justice announced today that it has reached an agreement with representatives of the all-terrain vehicle (ATV) industry ending the sale of all three-wheeled ATVs and requiring the industry to undertake a vigorous public awareness campaign to inform consumers of the risks associated with ATVs.

A lawsuit filed today in U.S. District Court for the District of Columbia against several ATV manufacturers and distributors seeks to declare ATVs as imminently hazardous consumer products.

The complaint was accompanied by preliminary consent decrees which, when approved by the court, will resolve most of the issues raised in the lawsuit, while reserving to the Commission the right to seek further relief at a later date if the remedies in the consent decree do not significantly reduce ATV-related deaths and injuries. Such further relief could include possible repurchase or recall actions. Performance standards are also to be developed for all ATVs.

Deputy Attorney General Arnold I. Burns said that the lawsuit seeks the immediate relief necessary to protect the

(MORE)

public from the unreasonable and imminent risk of death and personal injury presented by ATVs.

Burns said that the preliminary consent decrees accomplish most of what the government seeks in its complaint, including safety warnings to consumers and past purchasers, an effective method of marketing which explains the risks associated with ATVs, as well as extensive industry-paid training for purchasers of ATVs.

Burns said that it is in the consumers' interest to resolve the ATV matter as expeditiously as possible. "The advantage of the preliminary consent decrees is that the government is achieving most of the relief sought in the complaint which would otherwise be afforded only after protracted and costly -- as well as successful -- litigation."

The lawsuit names:

-- Honda Motor Co., Ltd., of Tokyo, Japan, manufacturer of ATV's;

-- American Honda Motor Co., Inc., of Gardena, California, Honda's American supplier of ATVs;

-- Honda Research & Development Co., Ltd., of Saitama, Japan, Honda's research and development arm;

-- Yamaha Motor Co., Ltd., of Iwata, Japan, manufacturer of ATV's;

-- Yamaha Motor Corp., U.S.A., of Cypress, California, Yamaha's American supplier;

-- Suzuki Motors Co., Ltd., of Hamamatsu, Japan, a manufacturer of ATV's;

(MORE)

-- U.S. Suzuki Motor Corp., U.S.A., of Brea, California, Suzuki's American distributor of ATV's;

-- Kawasaki Heavy Industries, Ltd., of Kobe, Japan, a manufacturer of ATVs;

-- Kawasaki Motor Corp., U.S.A., of Santa Ana, California, a manufacturer and distributor of ATV's; and,

-- Polaris Industries, Inc., of Minneapolis, Minnesota, a manufacturer and distributor of ATV's.

Burns said the government has agreed to two consent decrees, one with Polaris, and the other with the remainder of the defendants. Although the two decrees accomplish the same things, Polaris was permitted to enter into a separate one because of the small size of their business and the differences in their marketing practices.

Burns said the lawsuit and the negotiated consent decrees are the result of a vigorous and in-depth review, conducted by the Justice Department's Civil Division, following a referral by the Consumer Product Safety Commission in February 1987. The Civil Division's trial team included attorneys from the CPSC.

Commissioner Terrence Scanlon, Chairman of the Consumer Product Safety Commission, said that acting upon the CPSC staff's recommendation, the Commission unanimously approved filing the lawsuit against the industry, and a majority endorsed the consent decrees.

Burns and Scanlon said they were pleased that the issue is being settled by a consent decree, rather than through protracted

(MORE)

and costly litigation. The industry has essentially agreed to all of the safety-related relief that the Commission sought, they noted.

The lawsuit was brought under Section 12 of the Consumer Product Safety Act, which permits the government to file suit for emergency relief against any manufacturer, distributor or retailer of an "imminently hazardous consumer product," which, according to the Act, is defined as "a consumer product which presents imminent and unreasonable risk of death, serious illness or severe personal injury."

The lawsuit alleges that the risk of harm presented by ATV's is both imminent and unreasonable. Each time an ATV is operated, its rider faces an unacceptably high risk that, at any moment and with no sign of impending danger, he or she may die or suffer a severe personal injury, according to the complaint.

ATVs are three- and four-wheeled motorized vehicles generally characterized by their large, balloon-like tires, their large saddle seats, and their handlebar steering. They have short wheelbases, solid rear axles, and a high center of gravity. They typically weigh between 250 and 500 pounds and are often capable of achieving speeds in excess of 50 miles per hour.

An estimated 2.3 to 2.4 million ATVs are currently in use in the United States, with an estimated 6.75 million riders. About two-thirds of the ATVs currently in use are three-wheeled.

(MORE)

According to the complaint, despite the illusion of stability created by the ATVs' appearance, ATVs actually are unique, complex and dynamically unstable vehicles, requiring quick perception, decision and reaction times and precise body movement and positioning for their safe operation.

Scanlon said, "This lawsuit seeks to alleviate the risks associated with ATV use and the peril in which millions of innocent and inadequately informed individuals who presently operate, or will in the future operate ATVs are placed."

The complaint alleges that the innocuous outward appearance of the ATV gives no hint of the consequences which can result from not receiving adequate instruction and hands-on training, even while attempting to execute unexceptional, simple riding maneuvers, such as turning and stopping.

The complaint alleges that ATVs are imminently and unreasonably hazardous for a combination of reasons including, but not limited to: (1) The safety and stability of the ATV has been misrepresented by advertisements and salespeople; (2) The labelling fails to adequately warn ATV purchasers and users about the risks and hazards of operating an ATV; (3) The owner/user manuals provided with ATVs do not contain many of the safety messages that are critical to proper ATV operation; (4) Defendants have failed to provide and promote adequate hands-on training for ATV operators; (5) Defendants have provided ATV

(MORE)

dealers with insufficient and erroneous information about ATV operation of the attendant risks and hazards; and, (6) Defendants have encouraged the use of adult-sized ATVs by children under 16, who lack the cognitive and motor development necessary to operate such ATVs safely.

Burns said the risk of harm presented by ATVs is evident from the alarming and tragic number of deaths and severe personal injuries which have resulted from reasonable, foreseeable use of ATVs since 1982.

Between January 1982 and September 1987, more than 900 deaths were reported to the CPSC, and thousands of severe personal injuries have resulted from use of ATVs in the same time period, Burns said. But, as Burns indicated, these figures are low estimates in that not all ATV-related injuries and deaths are reported to the Commission.

The complaint alleges that the risk of harm presented by ATVs is especially tragic considering the number of children under 16 years old who have died or been severely injured as a result of an ATV accident.

The consent decrees embody a comprehensive approach to ATV safety and require the defendants to, among other things:

-- Send a notice to all known past purchasers of ATVs informing them of the risks associated with ATVs;

(MORE)

-- Provide all American distributors and retailers of ATVs with four foot by four foot signs containing the same warnings, which must be displayed prominently;

-- Immediately halt the sale of all three-wheeled ATVs and 3 offer to repurchase those three wheelers in dealers' open stock;

-- Affix warning labels to all ATVs marketed and sold by the defendants;

-- Include risks associated with ATVs in owner's manuals;

-- Establish a toll free hot-line number for consumer questions on ATVs;

-- Establish a detailed administrative framework and the necessary staffing to conduct ATV training, in addition to offering free hands-on training to all future ATV purchasers as well as those who purchased ATVs in the last 12 months;

-- Agree not to oppose state legislative initiatives for the licensing and certification of ATV operators;

-- Agree to establish specific guidelines for future advertising about the image of ATVs including, but not limited to, specific guidelines on the types of terrain on which ATVs should be driven, the speeds at which they should be driven, the stability of ATVs, the importance of training courses and appropriate age recommendations for various ATV models;

(MORE)

-- Agree to undertake a substantial public awareness campaign consisting of print advertisements and radio and television commercials dealing with the potential hazards and risks associated with ATVs; and,

-- Agree to represent, including through the print and electronic media, the minimum age limits for various ATV models.

Burns said the decrees reserve the right of the CPSC to proceed administratively, after twelve months from approval of a final consent decree, to seek a further and more extensive recall and repurchase remedy under Section 15 of the Consumer Product Safety Act. The government also reserves to the CPSC the right to proceed under the Federal Hazardous Substances Act (FHSA), at any time, against ATVs which are marketed for children under 12 years.

Under what Condition?

The decrees also permit the CPSC to continue administrative proceedings -- begun before entry of this decree -- under the Consumer Product Safety Act and the FHSA to develop performance standards for ATVs. It requires the industry to attempt, in good faith, to reach agreement on voluntary standards satisfactory to the CPSC within four months of court approval of a final consent decree.

The decrees require that the preliminary consent decrees be incorporated into a final decree and submitted to the court for

(MORE)

approval within 45 days of the Court's approval of the preliminary decrees.

Burns said that if the remedies agreed to in the preliminary consent decrees are not consummated within 45 days of the court's approval, the government's right to litigate this case shall be unharmed.

"The Department of Justice and the Consumer Product Safety Commission are firmly committed to the goals set forth in the lawsuit and we believe that the resolution that has been reached in this case is excellent. We are confident that this agreement will go a long way toward preventing deaths and injuries that have been associated with these machines in the past," Burns said.

"We are hopeful that the cooperation shown by the industry in reaching this preliminary consent decree will continue," Burns added.

# # # # #

87-467

Appendix 7.—Justice Department Complaint, United States of America v. American Honda Motor Co., Inc., et al.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice
Civil Division, Federal Programs Branch
Room 3744
10th & Pennsylvania Avenue
Washington, D.C. 20530
Telephone: (202) 633-3313

Plaintiff,

v.

AMERICAN HONDA MOTOR CO., INC.
Box 50
100 W. Alondra Blvd.
Gardena, Ca. 90247
Telephone: (213) 327-8280

HONDA MOTOR CO., LTD.
1-1, Minamiaoyama 2-Chome
Minato Ku
Tokyo 107
Japan
Telephone: 03 413-1111

HONDA RESEARCH & DEVELOPMENT CO., LTD.
81-1 Honcho Wako
Saitama
Japan

YAMAHA MOTOR CO., LTD.
2500 Shingai
P.O. Box 1
Iwata
Shizuoka 438
Japan
Telephone: 05383 2-111

YAMAHA MOTOR CORP., U.S.A.
6555 Katella Ave
Cypress, Ca. 90630
Telephone: (714) 761-7300

SUZUKI MOTORS CO., LTD.
300, Takatsuka, Kamimura
Hamana-Gun 432
Shizuoka Pref
Japan
Telephone: 0534 40-2111

Civil Action No.

____

U.S. SUZUKI MOTOR CORP.
3251 E. imperial Hwy
Brea, Ca. 92621
Telephone: (714) 996-7040

KAWASAKI HEAVY INDUSTRIES LTD.
1-18, Nakamachi-Oori 2-Chome
Chud-Ku
Kobe
Hyogo 650
Japan
Telephone: 078 341-7731

KAWASAKI MOTORS CORP., U.S.A.
Box 25252
2009 E. Edinger Ave.
Santa Ana, Ca. 92799
Telephone: (714) 770-0400

POLARIS INDUSTRIES, L.P.
1225 N. County Rd. 18
Minneapolis, Mn. 55441
Telephone: (612) 542-0500

Defendants.

COMPLAINT

NATURE OF THE CASE

1. The United States of America, by its undersigned attorneys, brings this action for declaratory and injunctive relief to protect the public from the imminent and unreasonable risk of death and severe personal injury presented by motorized vehicles known as "all-terrain vehicles," or "ATVs."

2. Each day millions of individuals, a large number of them children under the age of 16, are unwittingly exposed to the risk that, as a result of their operation of ATVs, they will be involved in an accident in which they will either die or suffer a

severe personal injury such as quadriplegia, paraplegia, a ruptured organ, or a skull or bone fracture.

3. Far from being safe, easy-to-ride vehicles for harmless play, as defendants have falsely and deceptively represented them to be, ATVs actually are unique and complex vehicles, requiring for their successful operation constant and precise rider manipulation which is neither instinctive nor easily mastered by a person of ordinary skill. Moreover, in contrast to the operation of other motor vehicles and unbeknownst to ATV riders, there is virtually no margin for error in the operation of ATVs because of their peculiar operating characteristics, and the penalty for making the smallest miscalculation may be death or a severe injury.

4. The precautions necessary to abate the grave hazard posed by ATVs -- such as truthful, nonmisleading advertising; a public awareness campaign; free hands-on training; careful oversight of point-of-purchase representations; and a limited refund -- are relatively inexpensive, particularly when compared to the high cost in human suffering caused by ATVs. Nevertheless, the manufacturers and distributors of ATVs have failed to implement these precautions.

5. The United States brings this action to gain the immediate relief necessary to protect the public from the unreasonable and imminent peril in which the defendants have placed, and continue to place, the millions of innocent,

inadequately informed individuals who presently operate, or will in the future operate, ATVs.

JURISDICTION AND VENUE

6. This action arises under Section 12 of the Consumer Product Safety Act ("the CPSA"), 15 U.S.C. § 2061, as amended (1981). This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. §§ 2061(a), (b)(1) and (d)(1), and 28 U.S.C. §§ 1337 and 1345. Venue lies in this district pursuant to 15 U.S.C. § 2061(d)(1) and 28 U.S.C. § 1391(b).

THE PARTIES

7. The plaintiff is the United States of America.

8. Defendants Honda Motor Co., Ltd. ("Honda"), Yamaha Motor Co., Ltd. ("Yamaha"), Suzuki Motors, Co., Ltd. ("Suzuki"), Kawasaki Heavy Industries Ltd. ("Kawasaki"), and Kawasaki Motor Corp., U.S.A. ("Kawasaki U.S.A.") are manufacturers of various models of ATVs. The first four parties are headquartered in Japan: Honda in Tokyo, Yamaha in Iwata, Suzuki in Hamamatsu, and Kawasaki in Kobe. Kawasaki U.S.A. is headquartered in Santa Ana, California.

9. Defendants American Honda Motor Co., Inc. ("American Honda"), Yamaha Motor Corp., U.S.A. ("Yamaha U.S.A."), U.S. Suzuki Motor Corp. ("U.S. Suzuki"), and Kawasaki U.S.A. are the wholly-owned subsidiaries of, respectively, defendants Honda, Yamaha, Suzuki, and Kawasaki. They are the United States distributors of the ATVs manufactured by their parent companies, and, in the case of Kawasaki U.S.A, by itself. They are all

headquartered in California: American Honda in Gardena, Yamaha U.S.A. in Cypress, U.S. Suzuki in Brea, and Kawasaki U.S.A. in Santa Ana.

10. Defendant Honda Research & Development Co., Ltd. ("Honda Research") is the research and development arm of defendant Honda, headquartered in Saitama, Japan.

11. Defendant Polaris Industries, L.P. ("Polaris") is a Minnesota corporation headquartered in Minneapolis, Minnesota. Polaris is a manufacturer and distributor of ATVs.

12. Whenever this Complaint refers to any act of the "defendants," the reference shall be deemed to mean that the directors, officers, employees or agents of the defendants authorized such act while actively engaged in the management, direction, or control of the affairs of the defendants and while acting within the scope of their employment. Whenever this Complaint refers to any act of "defendants," the reference shall be deemed to mean the act of each defendant, jointly and severally.

THE STATUTORY SCHEME

13. Section 12 of the CPSA, the statutory section under which this suit is brought, authorizes the United States to sue in United States district court for emergency relief against any manufacturer, distributor or retailer of an "imminently hazardous consumer product," defined as "a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury." 15 U.S.C. § 2061(a).

14. A "consumer product" under the CPSA is "any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise . . .," excluding certain categories of products not pertinent to this lawsuit. 15 U.S.C. § 2052(a)(1).

15. An imminent hazard suit under Section 12 of the CPSA is authorized notwithstanding the existence of a consumer product safety rule applicable to an imminently hazardous consumer product, or the pendency of any administrative or judicial proceedings under any other provision of the CPSA. 15 U.S.C. § 2061(a).

16. The district court in which an imminent hazard action is initiated has jurisdiction "to declare [the product in question] an imminently hazardous consumer product, and . . . to grant (as ancillary to such a declaration or in lieu thereof) such temporary or permanent relief as may be necessary to protect the public from [the risk posed by the product]." 15 U.S.C. § 2061(b)(1). Such relief may include a mandatory order requiring the notification of such risk to purchasers of the product known to the defendant (or defendants), public notice of the risk, and the recall, repair or replacement of, or refund for, the product. 15 U.S.C. § 2061(b)(1).

THE CONSUMER PRODUCT

17. ATVs are three- and four-wheeled motorized vehicles generally characterized by their large, balloon-like tires, their large, saddle seats, and their handlebar steering. They have short wheelbases (relative to axle width), solid rear axles, and a high center of gravity. They typically weigh between 250 and 500 pounds and many models are capable of achieving speeds in excess of 50 miles per hour.

18. ATVs have engine sizes ranging from 50 cubic centimeter displacement ("ccd") to 500 ccd. The recent trend among defendants has been to manufacture and distribute a greater percentage of the ATV models having larger, more powerful engines.

19. ATVs are consumer products within the meaning of the CPSA.

20. ATVs have been promoted as being able to "go anywhere" and to traverse virtually all types of terrain, including mud, snow, water, sand, dirt, grass, and rocky and rutted surfaces. They have also been advertised as being able to perform such feats as ascending and descending extremely steep slopes, and performing "wheelies," high-speed maneuvers, tight turns, and jumps.

21. Despite the illusion of stability created by the ATV's appearance and defendants' deceptive advertising, ATVs actually are unique, complex, and dynamically unstable vehicles, requiring

quick perception, decision and reaction times and precise body movement and positioning for their safe operation.

22. An estimated 2.3 - 2.4 million ATVs are currently in use in the United States, with an estimated 6.75 million riders. About two-thirds of the ATVs currently in use are three-wheeled.

23. The retail price of an ATV typically ranges from $600 to $3,500.

CAUSE OF ACTION

THE IMMINENT AND UNREASONABLE HAZARD

24. The risk of harm presented by ATVs is both imminent and unreasonable. Each time an ATV is operated, a rider who is not aware of the unique handling characteristics of the vehicle and is not trained or experienced in its proper use faces an unacceptably high risk that, at any moment and with no sign of impending danger, he or she will either be killed or suffer a severe personal injury. This peril will continue unabated until the relief requested by plaintiff is granted.

25. ATVs are imminently and unreasonably hazardous for a combination of reasons:

(a) First, the ATV design is such that an ATV appears to be safe and stable, belying the fact that it actually is dynamically unstable and complicated to operate;

(b) Second, the nature of the ATV and its operation is such that, frequently, when a rider loses control, before having time to react, the vehicle rolls over on the rider or throws and lands on the rider, aggravating the accident to the extent death or severe personal injury all too often results.

(c) Third, defendants have encouraged the use of adult-sized ATVs by children under 16, who lack the cognitive and motor development necessary to operate such ATVs safely;

(d) Fourth, the manipulative skills absolutely essential for safe ATV operation are neither instinctive nor easily acquired, especially by children under 16;

(e) Fifth, defendants have falsely and deceptively promoted ATVs as safe, easy-to-operate vehicles for the entire family and have created the illusion that riders of all ages can perform remarkable feats and stunts safely and with ease;

(f) Sixth, defendants have failed to effectively alert operators to the risks and hazards presented by ATVs and to the dire consequences of not abiding by prohibitions and instructions;

(g) Seventh, defendants have not offered and actively promoted free, effective hands-on training for ATV purchasers, even though such instruction is absolutely essential to impart the complex skills required to operate ATVs;

(h) Eighth, defendants have provided ATV dealers with insufficient, deceptive or erroneous information about ATV operation and the attendant risks and hazards. In addition, defendants have failed to exercise adequate control over dealer representations to ATV consumers, resulting in the dissemination of dangerously insufficient, deceptive or false information about ATVs.

ATV Deaths and Severe Injuries

26. The risk of harm presented by ATVs is evident from the alarming and tragic number of deaths and severe personal injuries which have resulted from reasonable, foreseeable use of ATVs since 1982.

27. Between January, 1982, and September, 1987, more than five hundred such deaths were reported to the Consumer Product Safety Commission ("the Commission"), the federal regulatory commission charged with investigating product-related deaths, illnesses and injuries. See 15 U.S.C. § 2053(a).

28. For the period January, 1982, to September, 1987, the Commission, based on a statistically representative sampling of hospital emergency rooms, estimates that more than three thousand severe personal injuries have resulted from the reasonable, foreseeable use of ATVs.

29. The actual number of deaths and severe personal injuries resulting from reasonable, foreseeable use of ATVs is higher than paragraphs 27 and 28 reflect. For instance, not all ATV-related fatalities are reported to the Commission. Also, the number of hospital-emergency-room treated injuries does not reflect accidents in which the victim checked into the hospital, went directly to the operating room, or was treated in a private physician's office or clinic.

30. The risk of harm presented by ATVs is especially tragic considering the large number of children under 16 years old who have died or been severely injured as a result of an ATV accident.

31. The risk of harm presented by ATVs is particularly high for individuals with less than one year experience riding an ATV.

ATV Appearance

32. The appearance of an ATV creates the illusion of a safe, stable and easy-to-operate vehicle because of the number of tires it has, the size and shape of the tires, and the size and shape of the body.

33. The three-wheeled ATV resembles an overgrown tricycle, while the four-wheeled ATV appears to be even safer with its fourth wheel.

34. The innocuous outward appearance of the ATV gives no hint of the significant design differences between it and other vehicles which make the ATV operate and respond like no other vehicle.

35. The innocuous outward appearance of the ATV gives, to those who have not received adequate instruction and hands-on training, no hint of the crippling or fatal accidents that can suddenly occur, even while attempting to execute unexceptional, simple riding maneuvers such as turning and stopping.

36. The innocuous outward appearance of the ATV gives no hint of the tragic consequences which can result from not following warning labels or instructions which do not contain an

explicit explanation of the hidden hazards. For example, the appearance of the ATV offers no clue about why riding on paved surfaces would be hazardous. Similarly, the general illusion of safety created by the ATV's appearance, coupled with the long saddle seat, encourages carrying passengers, since it is not readily apparent why such a practice would be hazardous. In fact, riding on paved surfaces and carrying passengers is especially hazardous because of the operational dynamics of the ATV.

ATV Dynamics

37. Because of their unique design, ATVs are dynamically unstable and complicated to operate. They require the rider to perform a difficult, demanding and delicate balancing act, with the risk that the vehicle will go out of control at any moment.

38. The safe, successful operation of an ATV requires a high degree of "rider interaction" in the form of constant, precise body movement and positioning, and continuous, precise steering and speed corrections.

39. Successful operation of an ATV requires proper shifting of the rider's weight forward or backward when going uphill or downhill, and requires, in addition to turning the handlebars, proper side shifting of the rider's body and proper distribution of his or her weight when turning. Traversing a slope is also precarious, requiring that the rider keep his or her body weight shifted far to the uphill side of the ATV. During all maneuvers, the ATV rider must properly respond to constantly changing

circumstances, making the necessary changes in body positioning, steering and speed at precisely the right moment.

40. At times, ATVs require reactions on the part of the operator which are not only physically difficult but also counter-intuitive. For example, to successfully execute a turn, the operator, in addition to steering the handlebars, must shift his or her body weight to the outside (rather than inside) of the turn, while at the same time leaning toward the turn. This must be done to reduce the weight on the inside rear wheel and overcome the straight-ahead directional force created as a result of the solid rear axle. Failure to un-weight the inside rear wheel will result in the vehicle continuing to plow straight ahead rather than turn in the direction intended. On the other hand, un-weighting the inside rear wheel too much will cause the ATV to tip over.

41. There is virtually no margin for error in the operation of an ATV because of such peculiar operating characteristics. If an ATV is not operated in precisely the right way for the particular circumstances, loss of control is likely to result with little or no sign of impending danger and insufficient time to take corrective action.

42. The smallest operational error can result in death or severe personal injury because the ATV, due to its high center of gravity and highly frictional balloon-type tires, is prone to tip and roll over on the rider, roll end-to-end and land on the rider or violently throw the rider, when the rider loses control. Due

to the design of the ATV and the necessity for rider input to control the vehicle, the rider is often unable to jump clear of the vehicle. When the ATV tips or rolls over on the rider, the weight of the ATV may crush the rider, seriously aggravating the resulting injuries.

43. Loss of control can result even while operating at slow speeds or when contact is made with very minor terrain irregularities, such as small bumps, rocks, holes or ruts. ATVs are marketed for operation over terrain that typically contains such irregularities.

44. Loss of control occurs more readily with three-wheeled ATVs than with four-wheeled ATVs.

45. The manipulative skills which are necessary to operate an ATV safely and successfully are neither instinctive, simple, nor easily acquired.

46. Only experienced and skilled riders can ride ATVs safely and, even then, the danger of losing control, and the attendant consequences, are always present.

ATVs and Children

47. The risk of harm presented by ATVs is substantially magnified when they are operated by children under 16 years old.

ATV Advertising

48. The marketing of ATVs by defendants -- via television, radio and print advertisements, as well as point-of-purchase materials -- has represented ATVs to be safe, stable vehicles that anyone, including children under 16, can readily master,

when, in fact, ATVs are dynamically unstable and complicated to operate.

49. The marketing of ATVs has created an entirely false and dangerous sense of security and unrealistic expectations on the part of purchasers and users.

50. Defendants have created the illusion that anyone, including children under 16, can easily and safely ride ATVs with no training and little or no practice.

51. Defendants have created the illusion that ATVs can easily and safely "go anywhere," when in fact ATV operation on some types of terrain is extremely hazardous.

52. Defendants have represented that ATVs can be used easily and safely by anyone to perform feats -- such as ascending and descending steep slopes, and performing "wheelies," tight turns, high speed maneuvers, and jumps -- when in fact such maneuvers can be performed safely by only the most experienced, skilled rider. Moreover, defendants have actively encouraged such use.

53. Defendants have shown riders operating ATVs without protective equipment and clothing, riding alone, riding with one hand, looking back while riding, and being inattentive while riding.

54. The advertising of ATVs has failed to alert and warn ATV purchasers and users about the complex handling characteristics of ATVs and the hidden hazards of ATV riding.

ATV advertising has failed to alert purchasers and users about the need for hands-on training.

55. ATV advertising has failed to alert ATV purchasers and users about the grave consequences of not operating the appropriate size ATV, of not wearing protective equipment and clothing (such as a helmet and boots), of carrying passengers, of not being constantly alert and aware of the surrounding terrain, of riding on paved roads, of not maintaining proper tire pressure, and of riding while under the influence of alcohol or drugs.

56. Children under the age of 16 are especially susceptible to defendants' misleading and suggestive advertising.

ATV Labelling

57. The labelling on ATVs fails to adequately warn ATV purchasers and users about the risks and hazards of operating an ATV.

58. ATV labelling fails to stress to ATV purchasers and users the grave consequences of not adhering to the various prohibitions.

59. ATV labelling does not meet generally accepted design criteria, including those for use of signal words, symbols, spacing, and color scheme.

60. ATV labelling does not meet generally accepted design criteria for durability.

61. ATV labelling exceeds the appropriate readability level for this type of material.

ATV Owner/User Manuals

62. The owner/user manuals provided with ATVs do not contain many of the safety messages that are critical to proper ATV operation.

63. The manuals do not adequately apprise ATV purchasers and users of the risks of ATV-riding and the dire consequences of not adhering to the various prohibitions and instructions.

64. The manuals do not present safety information in such a way as to draw the operator's attention to this material.

65. The manuals exceed the appropriate readability level for this type of material.

ATV Training

66. Defendants have failed to provide and actively promote adequate hands-on training for ATV operators, resulting in many untrained or poorly trained users operating ATVs without the skills and knowledge needed to safely operate an ATV.

67. The complex manipulative skills which are essential for safe ATV operation can only be obtained through the provision of qualified hands-on training.

68. The training program developed by the trade association representing the ATV industry (the Specialty Vehicle Institute of America) is inadequate in a number of ways. Moreover, this training program has not been effectively promoted or made available to ATV purchasers and users.

ATV Point-of-Purchase Information

69. Defendants have provided ATV dealers with insufficient, deceptive or erroneous information about ATV operation and the attendant risks and hazards, resulting in the dissemination of dangerously insufficient, deceptive or false information about ATVs.

70. Defendants have failed to exercise adequate control over dealer representations to ATV consumers, resulting in the dissemination of dangerously insufficient, deceptive or false information about ATVs.

71. Defendants have caused the distribution of deceptive or inadequate point-of-purchase material, such as literature and videos.

Benefits and Cost of Relief

72. The benefits of the relief requested by the United States far outweigh the cost of imposing such relief. The items of relief requested are relatively inexpensive and their cost is far surpassed by the tragic toll of deaths and severe injuries which ATVs have inflicted and will continue to inflict absent this relief.

PRAYER FOR RELIEF

Wherefore the United States prays for the following relief from this Court:

1. A judicial declaration that ATVs manufactured and distributed by defendants in United States commerce are

"imminently hazardous consumer products" within the meaning of Section 12(a) of the CPSA, 15 U.S.C. § 2061(a).

2. An order prohibiting distribution of ATVs in commerce by defendants unless and until the following remedial actions are taken:

(a) A free hands-on training course designed to teach adequately the skills and knowledge necessary to ride an ATV safely is made available, with effective incentives for participation, to all future and all known prior purchasers of ATVs manufactured or distributed by defendants, and to their immediate families;

(b) Free, adequate written and visual training materials are made available to all future and all known prior purchasers of ATVs manufactured or distributed by defendants, and to their immediate families;

(c) An effective public awareness campaign, including an extensive electronic media campaign, is engaged in to alert adequately all ATV purchasers and users to the complexities and hazards associated with ATV riding, the appropriate age restrictions for the various ATV models, and the need for and availability of free training;

(d) The marketing of ATVs is altered such that the true nature of ATV operation is represented, unsafe riding practices are not represented or encouraged, and prospective ATV purchasers and users are alerted to the complexities and hazards associated with ATV riding, the appropriate age restrictions for the various ATV models, and the need for and availability of free training;

(e) Direct notice of the complexities and hazards associated with ATV riding, the appropriate age restrictions for the various ATV models, and the need for and availability of free training is provided to all future ATV purchasers and all prior ATV purchasers known to the defendants;

(f) The labelling on ATVs is altered to stress, adequately and effectively, the complexities and hazards associated with ATV riding, the appropriate age restrictions for the various ATV models, and the need for training, and new, effective labels are provided at no charge for all ATVs already distributed or sold;

(g) ATV owner/user manuals are altered to stress, adequately and effectively, the complexities and hazards associated with ATV riding, the appropriate age restrictions for the various ATV models, and the need for and availability of free training. ATV manuals are also altered to provide adequate safety information and instructions. New, effective manuals are provided at no charge for all ATVs already distributed or sold;

(h) Point-of-purchase material, written and video, is distributed through all ATV dealers to alert adequately actual and prospective ATV purchasers and users to the complexities and hazards associated with ATV riding, appropriate age restrictions for the various ATV models, and the need for and availability of free training;

(i) The guidance to ATV dealers is altered such that dealers are provided with sufficient, accurate information about ATV operation and its attendant risks and hazards;

(j) The oversight of dealer representations to ATV consumers is altered to reasonably assure that dealers disseminate to all actual and prospective purchasers all appropriate safety information and do not disseminate insufficient, deceptive or false information about ATVs.

(k) A toll-free ATV safety hotline is established and maintained to answer all questions regarding the operation of ATVs and the attendant risks and hazards, and this number and the toll-free number of the Consumer Product Safety Commission are effectively publicized.

3. An order of injunction requiring defendants to offer a reasonable refund for:

(a) all three-wheeled ATVs;

(b) all adult-sized four-wheeled ATVs purchased for use by children under 16 in the purchaser's immediate family.

4. An order of injunction requiring defendants to immediately halt sales of all three-wheeled ATVs and to undertake to repurchase all three-wheeled ATVs in the possession or control of distributors and retail dealers.

5. Award to plaintiff its reasonable costs, including reasonable attorneys' fees; and

6. Grant such other and further relief as this Court may find necessary to protect the public from the imminent and unreasonable risk of death and personal injury presented by ATVs.

Respectfully submitted,

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APPENDIX 8.—PRELIMINARY CONSENT DECREE, UNITED STATES v. AMERICAN HONDA MOTOR CO., INC., ET AL.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, **Plaintiff,** **v.** **AMERICAN HONDA MOTOR CO., INC., *et al.*,** **Defendants.**	**Civil Action No.** ________________

PRELIMINARY CONSENT DECREE

A. THE NATURE OF THE CASE

The complaint in this action was filed by the United States, at the behest of the Consumer Product Safety Commission ("CPSC"), requesting relief under § 12 of the Consumer Product Safety Act, 15 U.S.C. § 2061, as amended (1981). That section authorizes the government to seek, and a court to grant, "such temporary or permanent relief as may be necessary to protect the public" from the risk of "an imminently hazardous consumer product." The subjects of the government's suit are all-terrain vehicles, or ATVs, three- and four-wheeled motorized vehicles intended for off-road use by individual riders on various types of non-paved terrain. Defendants market and sell these vehicles for use by the general public.

The gist of the government's complaint is that ATVs appear relatively benign, but they actually are unique and complex, requiring a high degree of skill and constant attentiveness for safe operation. It is alleged that the peculiar behavioral

properties of ATVs, when coupled with their deceptively "safe" outward appearance, result in a high risk of injuries to users, particularly inexperienced and young users. Hundreds of ATV-related deaths and thousands of severe injuries have occurred since 1982, according to the complaint. The ATV industry, the government claims, has failed adequately to warn potential ATV users about the hazards presented by ATVs. The complaint alleges that television and print advertisements picture ATVs as "family fun vehicles" which pose little danger to their operators, that little safety information is imparted through industry marketing practices and that the current labeling practice is inadequate. Finally, the complaint alleges that the industry's training course has not been properly promoted and, therefore, not utilized by a significant number of ATV purchasers.

Relief of several kinds is sought in this lawsuit. Labels, notices and warnings are sought to advise consumers of the risks which the government claims are associated with ATV use, particularly to children and inexperienced riders. An industry funded training program is requested, as are changes in the marketing of ATVs. A media campaign addressed to correcting the alleged image of ATVs as inherently safe vehicles is also part of the prayer for relief. Finally, a voluntary repurchase program for three-wheeled ATVs and for four-wheeled adult-sized ATVs purchased for those under 16 years of age is also sought. Pending a final adjudication of its claims, the government seeks

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a preliminary injunction stopping the sale of ATVs without, what the government claims are, appropriate warnings and training.

The preceding paragraphs represent the government's allegations. Because this case is being settled, defendants [illegible] allegations. The [illegible] defendants contend that the government's [illegible] factual positions [illegible].

Recognizing that a full adjudication of these claims will involve protracted and extremely costly litigation and may not **enhance the common objective of promptly reducing additional deaths and injuries associated with ATV usage, the parties, without agreement with the other side's legal or factual positions, without any admission of fault or liability, and before any testimony has been taken and without trial or adjudication of fact or law, have determined to take certain immediate and long-term steps. Should these steps be faithfully undertaken as set out below, the need for this litigation will be obviated. Accordingly, the plaintiff and defendants American Honda Motor Co., Inc., Yamaha Motor Corp., U.S.A., U.S. Suzuki Motor Corp. and Kawasaki Motors Corp., U.S.A., by their undersigned attorneys, hereby agree and undertake as follows:**

B. DEFINITIONS

1. All-terrain vehicles (hereinafter referred to as ATVs) that are the subject of this preliminary consent decree are three- and four-wheeled motorized vehicles, generally characterized by large, low-pressure tires, a seat designed to be

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straddled by the operator, and handlebars for steering, which are intended for off-road use by an individual rider on various types of non-paved terrain.

2. "Defendants" means the companies signing this consent decree. This decree shall bind them, their officers, agents, servants and employees and those persons in active concert or participation with them who receive actual notice of this consent decree by personal service or otherwise. The term "defendants" does not include those persons who have a contractual dealer relationship with the defendants. The defendants undertake and agree, however, that they will use their best efforts, to the extent permitted under Federal and State law and applicable contracts, to ensure that the terms of this decree are carried out by their dealers and any authorized agents or representatives. By entering into this consent decree, defendants further warrant and represent that they have the authority to comply with the terms of this consent decree and that the exclusion of their parents from this consent decree will not affect defendants' ability to effectuate the terms of this consent decree.

3. "Best efforts" shall include, among other things, an obligation to require, to the extent permissible under Federal and State law, compliance by defendants' dealers, agents, or representatives with the terms of this preliminary consent decree and any final consent decree through the inclusion of a provision as a term in future contracts entered into with dealers and any

authorized agents or representatives, and where possible and within a reasonable time, to modify existing contracts with dealers and authorized agents or representatives to impose this duty.

C. SCOPE

The terms of this consent decree shall apply to all activities by defendants within the "United States," as defined in Section 3 of the Consumer Product Safety Act, 15 U.S.C. § 2052.

D. JURISDICTION AND VENUE

The defendants hereby submit themselves to the personal jurisdiction of this Court, waive service of process and agree that venue is proper in this district. The parties further agree that, notwithstanding any failure to reach a final consent decree, the foregoing sentence shall remain in effect and in full force. The defendants do not waive any other defenses to the complaint including, but not limited to, the Court's jurisdiction over the subject matter. For purposes of enforcing this preliminary consent decree only, defendants agree that this Court has subject matter jurisdiction of this action pursuant to 15 U.S.C. § 2061 and 28 U.S.C. §§ 1337 and 1345. The parties agree that, notwithstanding any failure to reach a final consent decree, the Court may exercise continuing jurisdiction for the purpose of effectuating the relief provided for in the preliminary consent decree.

E. IMMEDIATE NOTICE TO CONSUMERS OF FILING OF LAWSUIT AND PRELIMINARY CONSENT DECREE

1. The defendants agree to complete, within 20 days of the Court's approval of this preliminary consent decree, the following:

a. To mail to all known past purchasers of ATVs, by first class mail, a notice, in the form attached hereto as Appendix A, in envelopes prominently marked "important safety notice";

b. To provide to all retail dealers or, where ATVs are sold to consumers by agents or representatives of defendants who are not retail dealers, to such agents or representatives, signs measuring approximately four feet by four feet containing the message which is contained in Appendix A hereto and meeting with the approval of the government. Defendants agree to use high quality, durable printing materials and to use the color scheme, lettering (size and type) and spacing to best ensure that the message is easily read and understood. Defendants further agree to use their best efforts to ensure that such retail dealers, agents or representatives who sell ATVs to consumers immediately post such signs upon receipt in prominent places where ATVs are displayed, sold or offered for sale and keep such posters on display during the periods of this preliminary consent decree and of any final consent decree; and

c. To send to all retail dealers or any authorized agents or representatives of defendants who sell ATVs to consumers, a letter, in the form attached hereto as

Appendix B, setting forth the continued importance of consumer awareness of ATV safety concerns, especially the importance that the distributors attach to achieving a proper match between the vehicle and rider. The letter shall enclose a copy of this preliminary consent decree. The letter shall also enclose sufficient copies of the ATV Safety Verification Form, in the form attached hereto as Appendix C.

The parties further agree that the provisions of paragraph E, to the extent they are to be executed during the period that this preliminary consent decree is in effect, shall be enforceable by the Court from the date of the Court's approval of this preliminary consent decree, notwithstanding any failure to reach a final consent decree.

F. STOP-SALE AND REPURCHASE

1. Defendants agree and undertake, effective from the Court's approval of this preliminary consent decree, to halt their marketing of all three-wheeled ATVs and halt the distribution and sales of all three-wheeled ATVs to their retail dealers, agents or representatives who sell ATVs.

2. Defendants agree and undertake, within 5 business days after the Court's approval of this preliminary consent decree, to send a notification to each retail dealer, agent or representative of defendants who sells ATVs: (a) to immediately halt all marketing and sales of three-wheeled ATVs which are new or have not yet been sold to a consumer; and (b) offering to repurchase for a commercially reasonable cash amount, or to

provide credit or other commercially reasonable adjustment for, all such three-wheeled ATVs in the possession or control of such retail dealer, agent or representative.

3. The United States, through the Consumer Product Safety Commission, reserves the right to proceed administratively under Section 15 of the Consumer Product Safety Act, Section 15 of the Federal Hazardous Substances Act, or both, with respect to ATVs manufactured or distributed by defendants, if it determines, 12 months or more subsequent to the Court's approval of the final consent decree, that new and substantial evidence indicates that a further and more extensive remedy, including recall or repurchase, is warranted. If such new and substantial evidence is available, the government may then also rely upon presently available evidence in determining to commence a proceeding.

The parties further agree that the provisions of paragraph F, to the extent they are to be executed during the period that this preliminary consent decree is in effect, shall be enforceable by the Court from the date of the Court's approval of this preliminary consent decree, notwithstanding any failure to reach a final consent decree.

G. AGE LIMITS

1. Defendants agree, within 20 days of the Court's approval of this preliminary consent decree, to represent affirmatively, including in print and electronic media if defendants use such print and electronic media for advertising or promoting ATVs, that ATVs with engine sizes of 70 cubic

centimeter displacement ("ccd") up to and including 90 ccd should be used only by those aged 12 and older. This undertaking includes the commitment to use their best efforts to accomplish this relief through defendants' retail dealers, agents or representatives of defendants who sell ATVs.

2. Defendants agree, within 20 days of the Court's approval of this preliminary consent decree, to represent affirmatively, including in print and electronic media if defendants use such print and electronic media for advertising or promoting ATVs, that ATVs with engine sizes of greater than 90 ccd should be used only by those aged 16 and older, subject to further negotiations with respect to the terms and conditions under which a vehicle may be recommended for use by those aged 14 and older. This undertaking includes the commitment to use their best efforts to accomplish this relief through defendants' retail dealers, agents or representatives of defendants who sell ATVs.

3. Defendants agree, effective from the Court's approval of this preliminary consent decree, to undertake to reasonably assure that ATVs of the engine sizes set forth in subparagraphs G.1 and G.2 are not purchased by or for the use of any person under the minimum ages set forth above. This undertaking includes the commitment to use their best efforts to accomplish this relief through defendants' retail dealers, agents or representatives of defendants who sell ATVs.

The parties further agree that the provisions of paragraph G, to the extent they are to be executed during the period that this preliminary consent decree is in effect, shall be enforceable by the Court from the date of the Court's approval of this preliminary consent decree, notwithstanding any failure to reach a final consent decree.

H. **LABELS**

1. The defendants agree to develop safety warning labels for ATVs marketed or sold by them, in a form to be mutually agreed upon by the parties within 45 days of the Court's approval of this preliminary consent decree. Such labels will be attached to all ATVs sold or to be sold or marketed by defendants, in a location on the vehicle also to be agreed upon between the parties during that period, within 45 days of the Court's approval of the final consent decree, unless the parties agree to some other time.

2. The defendants further agree to develop safety warning labels, in a form to be mutually agreed upon by the parties within 45 days of the Court's approval of the preliminary consent decree, that will be mailed within 45 days of the Court's approval of the final consent decree, unless the parties agree to some other time, along with instructions explaining their necessity, to retail dealers, agents or representatives of defendants who sell ATVs for use on ATVs currently in inventory and to all prior purchasers for whom defendants have addresses.

3. At a minimum, and subject to further agreement of the parties, all such safety labels will comply with each of the following criteria:

a. __Format__: The safety messages contained in the labels shall be organized and presented in a manner intended to make the warning effective, assuring that the warning is conspicuous and emphasized, and that the operator can read and understand it, [illegible] the presentation and [illegible] which [illegible] type, using appropriate signal words, symbols and illustrations, ensuring that the messages are adequately legible, using appropriate contrasting color schemes, and providing proper spacing between messages.

b. __Location__: The labels shall be located so that they are conspicuous and will attract the attention of the ATV operator.

c. __Durability__: The labels shall be sufficiently durable to last the expected life of the ATV, so that its warnings remain available and effective throughout the vehicle's life.

d. __Readability__: The labels shall be written in simple, plain language so that they are at an appropriate reading comprehension level.

e. __Content__: The labels shall provide information and recommendations about the source and character of potential hazards. The labels shall include, but not be limited to: the special riding skills required by the vehicle; the risk that the vehicle will flip or overturn; the importance of training; the need for a helmet and other appropriate protective gear;

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appropriate age recommendations and the need to supervise minors; and prohibitions against carrying passengers, against use on paved surfaces and public roads, and against use after consuming alcohol or drugs. The labels shall prominently state that death or severe injury may result if the warnings are not heeded or the recommendations are not followed.

4. Notwithstanding the provisions of subparagraphs H.1 and H.2, any defendant may develop new labels for new models, provided that the defendant concludes in good faith that such new labels provide the required safety information in as effective a manner as the labels approved by the parties pursuant to subparagraphs H.1 and H.2. The defendants agree to submit copies of such labels, and a written rationale for the labels, to the General Counsel of the Consumer Product Safety Commission at least 30 days before distributing ATVs with the new labels.

I. NOTICES AND WARNINGS

1. The defendants agree to provide notices and warnings to all purchasers of new ATVs beginning within 45 days of the Court's approval of the final consent decree, in a form and in a manner to be agreed upon by the parties within 45 days of the Court's approval of this preliminary consent decree.

2. At a minimum, and subject to further agreement of the parties, the notices and warnings will include the following:

a. Owners' Manuals: Defendants agree to provide owners' manuals (or appropriate supplements thereto) with the sale of all vehicles including those already distributed to retail dealers, agents or representatives of defendants who sell ATVs that meet the following criteria. The manuals shall:

(1). Hazards: Warn users of the following potential hazards and risks associated with the operation of ATVs including, but not limited to:

a. driving on hills,
b. hitting or driving over obstacles,
c. driving on various terrains,
d. driving on paved surfaces,
e. driving at excessive speeds,
f. improper use of brakes,
g. improper tire pressure,
h. carrying passengers,
i. driving vehicles after consuming alcohol/drugs,
j. failure to wear protective clothing,
k. turning,
l. doing jumps or wheelies.

Each hazard shall be described using the following: (a) Society of Automotive Engineers ("SAE") safety alert symbol, (b) signal word, (c) illustration of the hazard when feasible, (d) narrative description of the hazard, (f) description of what can happen if the hazard is encountered and (g) description of what to do to avoid the hazard.

(2). Design and Content: Meet generally agreed upon criteria for design and content. This includes use of framing of safety information, specification of content and location of the warning labels. The manuals shall also include information detailing the availability of hands-on training and the importance of such training, the recommended age limits for the vehicle, the importance of reading the manual and information about where to store the manual on the machine.

(3). Readability: Be written in simple, plain language so that they are at an appropriate reading comprehension level.

b. Point-of-Purchase Materials: Defendants agree to use their best efforts to ensure that their retail dealers, agents or representatives who sell ATVs disseminate to all prospective ATV purchasers accurate information about ATV operation and the associated potential risks and hazards, including but not limited to the following:

(1). Hanging Tags: Defendants agree to distribute to their ATV retail dealers hanging tags containing appropriate safety warnings for display on each vehicle on the dealer's showroom floor. Tags shall thereafter be provided to such dealer with every new vehicle.

(2). Safety Video: Defendants agree to distribute to their ATV retail dealers a video that imparts appropriate safety information for exhibition to prospective purchasers.

(3). Safety Verification: Defendants agree to distribute to their retail dealers, agents or representatives who sell ATVs, safety verification forms containing appropriate warnings regarding the operation of ATVs. Defendants shall use their best efforts to ensure that such dealers, agents or representatives who sell ATVs explain every warning on the verification form to each ATV purchaser and to certify that he or she has done so. Defendants shall use their best efforts to ensure that purchasers are required to certify with their initials beside each warning that the warning has been read, explained, and understood and that purchasers are provided a copy of the verified safety form.

(4). Other Communications to Consumers: Defendants agree that written and video communications to actual or prospective ATV purchasers at point of purchase (such as brochures, showroom videos, and other promotional communications) shall contain appropriate safety warnings regarding the operation of ATVs and shall not contain misleading or false information.

(5). Oversight: Defendants agree to use their best efforts to ensure that dealers, agents or representatives of defendants who sell ATVs comply with the foregoing requirements, including, but not limited to, conditioning payments on compliance and making unannounced spot checks on dealerships to monitor dealer compliance. Defendants shall also use their best efforts to ensure that oral communications of retail dealers, agents or representatives of defendants who sell ATVs to actual and prospective purchasers contain safety information and do not contain misleading or false information.

(6). Dealer Guidance: Defendants agree to stress ATV safety information in written, oral, and video materials provided to dealers, agents or representatives of defendants who sell ATVs on how to promote and sell ATVs.

c. Toll-Free Number: Defendants agree to establish a toll-free ATV hot line to answer all questions regarding the operation of ATVs and the associated potential risks and hazards. Defendants agree to include this number and the number of the Consumer Product Safety Commission in all written and electronic safety communications.

3. Notwithstanding the provisions of subparagraphs I.1 and I.2, any defendant may develop owners' manuals and point-of-purchase materials for new models, provided that the defendant concludes in good faith that such manuals and point-of purchase materials provide the required safety information in as effective a manner as the manuals and materials approved by the parties pursuant to subparagraphs I.1 and I.2. The defendants agree to submit copies of such manuals and point-of-purchase materials, and a written rationale for them, to the General Counsel of the

Consumer Product Safety Commission at least 30 days before distributing them.

J. MARKETING AND MEDIA

1. The defendants agree to develop and follow the guidelines contemplated in subparagraph J.2.a of this section and to engage in a public awareness campaign to alert consumers to the skills needed for, and the potential hazards associated with, ATV riding within 45 days of the date of the Court's approval of the final consent decree, in a manner to be agreed upon by the parties within 45 days of the Court's approval of this preliminary consent decree.

2. At a minimum, and subject to further agreement of the parties, these actions shall include:

a. specific guidelines for future advertising about the image of ATVs including, but not limited to, the types of terrain on which ATVs should be driven, the speeds at which they should be driven, the stability of the ATVs, the importance of training courses, and appropriate age recommendations for various models; and

b. a substantial public awareness campaign which shall consist of print advertisements and commercials (radio and television) dealing with the potential hazards and risks associated with ATVs.

K. TRAINING

1. The defendants agree and undertake to offer, in a manner not contrary to applicable State law, a hands-on training program, at no charge to the consumer, to all future ATV purchasers and their immediate families and to all known persons who purchased ATVs within the last 12 months and their immediate families.

2. The defendants agree to begin implementation of the training program structure within 60 days of the date of the Court's approval of the final consent decree, in a form and in a manner to be agreed upon by the parties within 45 days of the Court's approval of this preliminary consent decree.

3. Defendants agree to provide sufficient staff and facilities to operate the training program on a nationwide basis, as exemplified by the following description:

a. Administrative Framework and Staffing: The defendants agree to develop an administrative framework to oversee the hands-on training program and to train new instructors. The entire training program will be administered from a central location with a Managing Director and five full-time directors (a State Program Director, a Curriculum Specialist, a Communications Director, an Instructor Training Director, and a Rider Training Director) and three full-time managers (a Publications Manager, a Rider Training Manager and a State Programs Director). These personnel will be primarily responsible for the following:

(1). The Curriculum Specialist will be responsible for development of all training materials and revising as needed the training curricula to address the needs of the public. The Curriculum Specialist will also assist in modifying the training program for state coordinated programs and creating new training materials as needed.

(2). The Communications Director will be responsible for creating and implementing press relations programs, advertising and promotion programs and coordinating these programs with industry representatives and regional and area administrators.

(3). The Instructor Training Director will be responsible for Chief Instructor and Instructor training programs. The Instructor Training Director will also supervise the Eastern and Western Field Representatives, as set forth below.

(4). The Rider Training Director will be responsible for the implementation of training programs nationwide. The Rider Training Director will assure the project plan is carried out so that students will be trained. The Rider Training Director will also organize and supervise the six Regional Administrators, as set forth below.

(5). The Publications Manager, under the supervision of the Communications Director, will be responsible for the production of all publications and training materials.

(6). The State Programs Manager will provide support to the state programs through technical assistance visits that will assist the states in creating effective training programs.

(7). The Rider Training Manager will assist the Rider Training Director.

Under this program, the country would be divided into six regions, each with at least one regional administrator and a secretary. About 350 area administrators would be spread out among the six regions. The regional administrators would be responsible for setting up the regional office, supervising the area administrators, working with the chief instructors, and working toward increasing the number of training sites and students taking the course. The area administrators would assist the instructors by contacting dealers and the Special Vehicle Institute of America ("SVIA") referral number to obtain names and addresses of students, scheduling classes and instructors. The Eastern/Western Field Representatives would be responsible for the conduct of Instructor training programs within their states to ensure that there are a sufficient number of instructors to conduct the training programs.

The regional administrators and area administrators will be the main recruiters of chief instructors. Each chief instructor will then train instructors plus act as a direct supervisor of the instructors in his area of authority. The instructors will conduct classes for up to twelve students in each session. The instructor will be paid for each rider actually trained as an incentive to train as many students as is reasonable. The chief instructors will also receive payment for each trained rider as an incentive for training good instructors and motivating their performance. In addition to a salary, the Regional Administrator and Area Administrator also will receive a commission as an incentive to motivate the personnel in their region.

Additional or different positions may be developed as required and with the CPSC's concurrence.

Defendants further agree to make every effort to establish a pool of 1,000 trained instructors within 6 months of the date of the Court's approval of a final consent decree.

b. Course Content: The training course will be modeled after the 6-hour format developed by the SVIA and will be subject to the approval of the CPSC. Defendants further agree to consider establishing a modified training course for riders between the ages of 12 and 16. At a minimum, however, defendants consent to the inclusion of the CPSC's injury and death statistics and a complete explanation of the potential hazards and risks associated with ATV operation into the curriculum of any established training course.

c. Incentives: The parties agree to consider when and under what circumstances additional incentives are required and incorporate any provisions on this subject into the final consent decree.

d. Age Limit: The defendants further agree that no individual under the age of 16 will be permitted to participate in the training program without the written consent of a parent or legal guardian. The consent form shall include, at a minimum, the CPSC injury and accident statistics and the appropriate age recommendations for various models of ATVs.

e. Participation: The defendants agree to permit other manufacturers and distributors of ATVs to utilize their training structure. The defendants shall be entitled to charge other manufacturers and distributors a reasonable fee for their utilization of the training structure. In addition, defendants further agree to permit persons not otherwise eligible to participate in the training course. Defendants may charge such individuals a reasonable fee for the training.

4. The parties agree to consider when and under what circumstances appropriate modifications may be made to the training program agreed upon in the final consent decree and incorporate any provisions on this subject into the final consent decree.

L. STANDARDS

1. The Consumer Product Safety Commission has commenced administrative proceedings under Sections 7 and 9 of the Consumer Product Safety Act and Section 3 of the Federal

Hazardous Substances Act for purposes of developing, through regulations or other authorized mechanisms, standards for ATVs.

2. The defendants agree to attempt in good faith to reach agreement on voluntary standards satisfactory to the Commission within four months of the Court's approval of the final consent decree. The United States, through the Consumer Product Safety Commission, agrees to provide defendants with a copy of a draft proposed standard within 30 days of the Court's approval of this preliminary consent decree.

3. To the extent that three-wheeled ATVs meet mandatory standards promulgated by the Commission or voluntary standards satisfactory to the Commission developed pursuant to subparagraph L.2, the marketing and sale of such vehicles shall be permitted, notwithstanding subparagraph F.1 above.

M. FINAL CONSENT DECREE

The parties to this preliminary consent decree hereby agree and undertake to negotiate a final consent decree, which shall supersede the preliminary consent decree, within 45 days following the Court's approval of this preliminary consent decree. The final consent decree shall incorporate paragraphs A, B, C, L, N, O, P, and Q, and shall incorporate the agreements reached pursuant to paragraph D, and such other terms as to which the parties may agree. Further, the final consent decree shall incorporate agreements reached between the parties pursuant to paragraphs H through K.

The Court's approval of a final consent decree shall constitute a full settlement of the government's complaint against defendants. If the final consent decree is not signed by the parties within [illegible] days of the date of the Court's approval of this preliminary [illegible] [illegible] and of no [illegible] preserving whatever rights they may have in connection with the ongoing litigation.

N. DISCLAIMER OF LIABILITY

The parties have entered into this preliminary consent decree and have agreed and undertaken to enter into a final consent decree for the purpose of resolving the controversy over the safety of ATVs without protracted and extremely costly litigation. In entering into these decrees, defendants do not admit that ATVs are or have been unsafe or defective nor do they admit any liability for any accidents, injuries or deaths involving such vehicles. In addition, defendants do not admit any fault, wrongdoing, or unlawful conduct with respect to any product or actions taken or any actions alleged in the complaint, including but not limited to, the alleged making of false and deceptive representations and failing to provide adequate warnings and instructions.

O. STATE LEGISLATIVE INITIATIVES

There are pending in certain state legislatures proposals for the licensing and certification of ATV operators. In

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entering into this preliminary consent decree, defendants agree and undertake not to oppose such pending or future state legislation to the extent that it provides for age limits for ATV operators consistent with those specified in this preliminary consent decree or for the requirement of hands-on training before a certificate or license is issued.

P. CHILD-SIZED ATVS

In addition to the understandings and agreements contained in this preliminary consent decree and any final consent decree, the United States, through the Consumer Product Safety Commission, reserves the right to proceed separately under the Federal Hazardous Substances Act against ATVs which are, or have been, marketed for children under the age of 12, and defendants reserve the right to challenge any such proceeding.

Q. ADDITIONAL RESERVATION OF RIGHTS

The United States, through the Consumer Product Safety Commission, further reserves the right to initiate rulemaking proceedings under the Consumer Product Safety Act and the Federal Hazardous Substances Act with respect to possible hazards alleged to be presented by ATVs in general. It also reserves the right to initiate proceedings under the Consumer Product Safety Act and the Federal Hazardous Substances Act with respect to possible hazards, other than those included in the government's complaint, alleged to be presented by specific defects in individual models of ATVs.

Date: 12/29/87

Stephen E. Hart
Counsel for Plaintiff, the
United States of America

Howard P. Willens

For American Honda
Motor Co., Inc.

For Yamaha Motor Corp., U.S.A.

For U.S. Suzuki Motor Corp.

For Kawasaki Motors Corp.,
U.S.A.

SO ORDERED:

UNITED STATES DISTRICT JUDGE

DATED: ____________________

Appendix A

[Company Letterhead]

ATV SAFETY ALERT

The Consumer Product Safety Commission has concluded that ALL-TERRAIN VEHICLES (ATVs) may present a risk of DEATH or SEVERE INJURY in certain circumstances. While accidents may occur for many reasons:

*** Over 900 people, including many children, have died in accidents associated with ATVs since 1982.

*** Many people have become severely paralyzed or suffered severe internal injuries as a result of accidents associated with ATVs.

*** Thousands of people have been treated in hospital emergency rooms every month for injuries received while riding an ATV.

Because of this, the United States Government has filed a lawsuit against all manufacturers and distributors of ATVs asking the Court to declare that ATVs are hazardous and to order the manufacturers and distributors to take actions to protect ATV riders. The distributors, while contesting the validity of the allegations made by the government, are presently engaged in discussions with the government to resolve these issues without litigation.

You should be aware that an ATV IS NOT A TOY AND MAY BE DANGEROUS TO OPERATE. An ATV handles differently from other vehicles, including motorcycles and cars. According to the Consumer Product Safety Commission, an ATV can roll over on the rider or violently throw the rider without warning and even hitting a small rock, bump, or hole at low speed can upset the ATV.

TO AVOID DEATH OR SEVERE PERSONAL INJURY:

- NEVER DRIVE AN ATV WITHOUT PROPER INSTRUCTION. TAKE A TRAINING COURSE. BEGINNING DRIVERS SHOULD RECEIVE TRAINING FROM A CERTIFIED INSTRUCTOR. Call 1-800-447-4700 to find out about training courses nearest you.

- NEVER LEND YOUR ATV TO ANYONE WHO HAS NOT TAKEN A TRAINING COURSE OR HAS NOT BEEN DRIVING AN ATV FOR AT LEAST A YEAR.

- ALWAYS FOLLOW THESE AGE RECOMMENDATIONS:
  - A CHILD UNDER 12 YEARS OLD SHOULD NEVER DRIVE AN ATV WITH ENGINE SIZE 70 CCD OR GREATER.
  - A CHILD UNDER 16 YEARS OLD SHOULD NEVER DRIVE AN ATV WITH ENGINE SIZE GREATER THAN 90 CCD.
- NEVER ALLOW A CHILD UNDER 16 YEARS OLD TO DRIVE AN ATV WITHOUT ADULT SUPERVISION. CHILDREN NEED TO BE OBSERVED CAREFULLY BECAUSE NOT ALL CHILDREN HAVE THE STRENGTH, SIZE, SKILLS OR JUDGMENT NEEDED TO DRIVE AN ATV SAFELY.
- NEVER DRIVE AN ATV AFTER CONSUMING ALCOHOL OR DRUGS.
- NEVER CARRY A PASSENGER ON AN ATV. CARRYING A PASSENGER MAY UPSET THE BALANCE OF THE ATV AND MAY CAUSE IT TO GO OUT OF CONTROL.
- NEVER DRIVE AN ATV ON PAVEMENT. THE VEHICLE IS NOT DESIGNED TO BE USED ON PAVED SURFACES AND MAY BE DIFFICULT TO CONTROL.
- NEVER DRIVE AN ATV ON A PUBLIC ROAD, EVEN A DIRT OR GRAVEL ONE, BECAUSE YOU MAY NOT BE ABLE TO AVOID COLLIDING WITH OTHER VEHICLES. ALSO, DRIVING ON A PUBLIC ROAD WITH AN ATV MAY BE AGAINST THE LAW.
- NEVER ATTEMPT TO DO "WHEELIES," JUMPS OR OTHER STUNTS.
- NEVER DRIVE AN ATV WITHOUT A GOOD HELMET AND GOGGLES. YOU SHOULD ALSO WEAR BOOTS, GLOVES, HEAVY TROUSERS AND A LONG SLEEVE SHIRT.
- NEVER DRIVE AN ATV AT EXCESSIVE SPEEDS.
- ALWAYS BE EXTREMELY CAREFUL WHEN DRIVING AN ATV, ESPECIALLY WHEN APPROACHING HILLS, TURNS, AND OBSTACLES AND WHEN DRIVING ON UNFAMILIAR OR ROUGH TERRAIN.
- ALWAYS READ THE OWNER'S MANUAL CAREFULLY AND FOLLOW THE OPERATING PROCEDURES DESCRIBED.

FOR MORE INFORMATION ABOUT ATV SAFETY, CALL THE CONSUMER PRODUCT SAFETY COMMISSION AT 1-800-638-2772, OR THE ATV DISTRIBUTORS' SAFETY HOTLINE AT 1-800-447-4700.

Appendix B

[Company Letterhead]

Date

Dealer
Address
City, State Zip

Dear Dealer:

As I am sure you are aware, the United States government is very concerned about the growing number of deaths and severe injuries accompanying the increased popularity and use of all-terrain vehicles. We in the industry are equally concerned and are committed to doing everything practicable to reduce deaths or severe injuries associated with ATV riding.

The United States government has initiated a lawsuit regarding ATVs. Without conceding the validity of the government's allegations, which are contested, and in order to resolve the controversy without protracted and costly litigation, we have negotiated a consent decree, which has been adopted by the court and which will govern the promotion and sale of ATVs as of this date. As required by that decree, we are sending you this letter. A copy of the consent decree is enclosed. You should read this document with care. It relates to the safety concerns that you must pass on to your customers.

Specifically, the decree requires that you stress to your customers that ATVs are not toys and that riding them is different from riding motorcycles or other motorized vehicles. ATVs have unique handling characteristics which are best mastered through a certified training course. We will be instituting a free training program for ATV buyers to encourage ATV training and will make details of this program available to you soon.

Second, the decree requires that you impress upon the customers the importance of the safety warnings contained on labels and in the manuals. Customers must understand that failure to obey these warnings could result in severe bodily injury or death.

Third, it is the policy of this company to ensure that ATVs are properly matched to their riders. We expect you to carry out that policy. That means strict adherence to the age recommendations for our various models. [Each manufacturer should describe what model may be sold to what age child.] Both the safety of our youngsters and the viability of the ATV industry depend critically upon your willingness to abide by these age recommendations.

Finally, the decree requires that no authorized dealer may complete a sale to a customer unless both the customer and the dealer have signed a statement verifying that the dealer has made the consumer aware of the age recommendations for the vehicle being purchased and pertinent safety warnings. These forms must be returned to [company name] in order for us to compensate you for the costs of assembling the vehicle.

We cannot emphasize enough the importance of your actions in helping to make ATV operation a safe recreational activity. As a [company name] dealer, you are in the front line in our efforts, and we need your full support and cooperation. We depend upon you to advise potential customers candidly and fully of all warnings and age recommendations. Ensuring that each consumer buys an appropriately sized machine and operates it safely is paramount to the successful future of your business and ours.

Sincerely,

John Doe
President
Company

Appendix C

ATV SAFETY VERIFICATION FORM

An ATV IS NOT A TOY AND MAY BE DANGEROUS TO OPERATE. An ATV handles differently from other vehicles, including motorcycles and cars. According to the Consumer Product Safety Commission, an ATV can roll over on the rider or violently throw the rider without warning and even hitting a small rock, bump, or hole at low speed can upset the ATV.

This form contains vital safety information. Your dealer will review the warnings with you and ask you to verify that you have read and understood each warning by placing your initials on the line beside it.

```
**************************************************
* Failure to obey these warnings could result in *
*        DEATH or SEVERE PERSONAL INJURY         *
**************************************************
```

I understand that I must:

___ NEVER ALLOW A CHILD UNDER __ YEARS OLD TO DRIVE THIS ATV.

___ NEVER ATTEMPT TO DRIVE AN ATV WITHOUT PROPER INSTRUCTION. TAKE A TRAINING COURSE. BEGINNING DRIVERS SHOULD RECEIVE TRAINING FROM A CERTIFIED INSTRUCTOR. I can call 1-800-447-4700 to find out about training courses nearest me.

___ NEVER ATTEMPT TO DRIVE AN ATV UNTIL I HAVE READ THE OWNER'S MANUAL.

___ NEVER LEND MY ATV TO ANYONE WHO HAS NOT TAKEN A TRAINING COURSE OR HAS NOT BEEN DRIVING AN ATV FOR AT LEAST A YEAR.

___ NEVER DRIVE AN ATV AFTER CONSUMING ALCOHOL OR DRUGS.

___ NEVER CARRY A PASSENGER ON AN ATV. CARRYING A PASSENGER MAY UPSET THE BALANCE OF THE ATV AND MAY CAUSE IT TO GO OUT OF CONTROL.

___ NEVER DRIVE AN ATV ON PAVEMENT. THE VEHICLE IS NOT DESIGNED TO BE USED ON PAVED SURFACES AND THE ATV MAY BE DIFFICULT TO CONTROL.

___ NEVER DRIVE AN ATV ON A PUBLIC ROAD, EVEN A DIRT OR GRAVEL ONE, BECAUSE I MAY NOT BE ABLE TO AVOID COLLIDING WITH OTHER VEHICLES. ALSO, DRIVING ON A PUBLIC ROAD WITH AN ATV MAY BE AGAINST THE LAW.

___ NEVER ATTEMPT TO DO "WHEELIES," JUMPS, OR OTHER STUNTS.

___ **NEVER** DRIVE AN ATV WITHOUT A GOOD HELMET AND GOGGLES. I SHOULD ALSO WEAR BOOTS, GLOVES, HEAVY TROUSERS, AND A LONG SLEEVE SHIRT.

___ **NEVER** DRIVE AN ATV AT EXCESSIVE SPEEDS.

___ [illegible] WHEN APPROACHING HILLS, TURNS, AND OBSTACLES, AND WHEN [illegible] PROCEDURES DESCRIBED IN OWNER'S MANUAL MAY CAUSE THE ATV TO [illegible]

I understand all of the above warnings and that failure to obey these warnings could result in death or severe bodily injury.

____
Customer's Signature Date

____
Customer's Name (Printed)

____
____
____
Customer's Address

I have explained the foregoing warnings to the above signed customer. I have provided the customer with a signed copy of this form. To the best of my knowledge, I have sold the customer an appropriately sized vehicle.

____
Dealer's Signature Date

____
Dealer's Name (Printed)

____
____
____
Dealer's Address

○